Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

THE HONORABLE JOHN MCBRYDE,

*Petitioner*,

v.

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the finality clause of the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c)(10) ("the Act"), bars a court from hearing as-applied constitutional challenges to the discipline of an Article III judge—including claims that the discipline imposed violates the judicial independence guaranteed by Article III and that the disciplinary proceedings denied the judge due process.

2. Whether punishing an Article III judge (including suspending him from hearing cases) based upon the merits of his substantive and procedural rulings and actions in cases properly before him violates the judicial independence guaranteed by Article III.

3. Whether the Act violates separation of powers and Article III judicial independence by empowering judicial administrative agencies to punish Article III judges for non-criminal "conduct prejudicial to the effective and expeditious administration of the business of the courts," 28 U.S.C. § 372(c)(1).

4. Whether a federal judge sanctioned under the Act is entitled to judicial relief because the Judicial Council and Judicial Conference exceeded their authority under the Act by (i) investigating and punishing the judge for the merits of his judicial findings, rulings, orders, and procedural rules, and (ii) conducting an investigation into, and punishing him for, conduct not the subject of a complaint made against him under the Act.

## RULE 14.1(b) STATEMENT

Pursuant to this Court's Rule 14.1(b), petitioner states that the parties in the court of appeals, who are respondents here, included: the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States (defendant-appellee below); the Review Committee's Chairman, Judge William J. Bauer (defendant-appellee below); the Judicial Council of the Fifth Judicial Circuit (defendant-appellee below); and the United States of America (intervenor/defendant-appellee below). Also a party below was the late Judge Henry A. Politz, who, at the relevant time, was Chief Judge of the United States Court of Appeals for the Fifth Circuit and presiding member of the Judicial Council of the Fifth Judicial Circuit.

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John McBryde, United States District Judge for the Northern District of Texas, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (App. 1a-51a) are reported at 264 F.3d 52. The order denying rehearing en banc and the dissent thereto (App. 302a-04a) are reported at 278 F.3d 29. The district court's opinion (App. 52a-124a) is reported at 83 F. Supp. 2d 135.

## JURISDICTION

The court of appeals entered judgment on September 21, 2001, and denied a timely petition for rehearing en banc on February 1, 2002. On April 16, 2002, the time for filing this petition was extended to and including June 1, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c), and pertinent constitutional provisions are set forth at App. 305a-07a.

## STATEMENT OF THE CASE

In this case, for the first time in the history of the federal judiciary, a judicial administrative body has deprived an Article III judge of a part of his judicial function of hearing and deciding cases as a sanction for rulings and judicial actions with which it disagrees. That sanction, together with a harsh and unprecedented public reprimand, was issued under the Judicial Conduct and Disability Act of 1980 ("the Act"). The sanctions were based almost entirely on disapproval of the judge's judicial philosophy embodied in his decisions and rulings, including his control of the conduct of proceedings in his courtroom.

The discipline imposed on Judge McBryde has received only truncated judicial consideration. In a marked departure

from precedents of this Court, other circuits, and its own prior decisions concerning statutory limits on judicial review, the D.C. Circuit majority held that it was precluded by statute from hearing Judge McBryde's as-applied constitutional challenges to the discipline imposed upon him, including his claim that the imposition of discipline based upon disagreement with his judicial actions violated constitutional guarantees of judicial independence—a claim the dissenting judge found convincing. The majority also refused to entertain Judge McBryde's facial separation-of-powers challenge to the statutory provision allowing suspension of case assignments, on the ground that the expiration of Judge McBryde's suspension while this case was pending mooted the issue.

Both the procedural rulings through which the D.C. Circuit majority avoided the difficult constitutional issues at the heart of this case and the merits of those constitutional issues themselves deserve review by this Court—the former because they represent distortions of the law of review preclusion and mootness and conflict in principle with the decisions of this and other courts, and the latter because they are unresolved issues of fundamental importance to the administration of justice in the federal courts.

**A.** ***The Administrative Proceedings.*** Proceedings against Judge McBryde began in 1995, after his rulings in two cases ("*Satz*" and "*Torres*") questioned the credibility of an Assistant U.S. Attorney and criticized the Clerk of the Northern District of Texas. The Chief Judge of the Northern District transferred the cases to his own docket and reversed Judge McBryde's rulings. Believing the transfers improper, Judge McBryde requested assistance from the Fifth Circuit Judicial Council—despite a threat that, if he did so, his entire judicial career would be explored.

On September 13, 1995, the chief circuit judge commenced the proceedings that led to this case by appointing a five-member committee of judges (including himself) to investigate not only Judge McBryde's request for assistance,

but also two "complaints" against Judge McBryde under 28 U.S.C. § 372(c). The first had been filed two months earlier by a disgruntled lawyer upset by Judge McBryde's procedural rulings in a civil case. The Clerk of the Fifth Circuit had advised the chief circuit judge that the complaint was subject to dismissal "as directly related to the merits of a decision or procedural ruling." J.A. 309. The second "complaint" was not a complaint at all, but a letter from then-Assistant Attorney General Frank Hunger expressing the Justice Department's support for the transfer of the *Satz* case.

On October 19, 1995, the committee held a hearing, telling Judge McBryde it was solely on his request for assistance. After Judge McBryde testified, the committee excluded him and heard a number of witnesses whose testimony concerned many other aspects of his performance as a judge. The next day, the Judicial Council issued an order rebuking Judge McBryde for his handling of the *Satz* and *Torres* cases and ratifying their transfer from his docket.

Judge McBryde promptly filed a mandamus petition in the Fifth Circuit challenging the transfers. The court eventually decided that Judge McBryde's actions in *Satz* and *Torres* were reasonable and the transfers were unlawful. *In re McBryde*, 117 F.3d 208 (5th Cir. 1997), *cert. denied*, 524 U.S. 937 (1988) (App. 315a-58a). The Judicial Council, however, accelerated its proceedings against Judge McBryde once he turned to the courts for relief.

In November 1995, the investigating committee retained private counsel, who sought opinions from two psychiatrists about Judge McBryde's mental stability—opinions solicited without notice to Judge McBryde and on the basis of inaccurate descriptions of his conduct in *Satz*, *Torres*, and other matters. The psychiatric opinions were used to support a July 1996 Judicial Council order requiring Judge McBryde to undergo a psychiatric examination, on pain of suspension of all case assignments if he refused. The Council dropped the suspension sanction when Judge McBryde filed a lawsuit, but it

persisted in seeking to compel him to undergo a mental examination by filing contempt proceedings.

Meanwhile, the chief circuit judge "identified" three more "complaints" against Judge McBryde. One was filed by a prisoner who said the judge was mentally unfit based on the "twisted reasoning" of his opinions. J.A. 486. The chief circuit judge rejected the court clerk's recommendation that it could be dismissed as frivolous. Another, from a friend of a convicted defendant, said Judge McBryde should be impeached for "collusion" with the prosecution. J.A. 511. The last was an unsworn complaint from a witness in *Satz*, who was upset that Judge McBryde had not believed his testimony. Despite the facial defects in these "complaints," the chief circuit judge "identified" their allegations as complaints under 28 U.S.C. § 372(c)(1), without stating reasons for his actions as that provision requires.

In the spring of 1997, the Council abruptly dropped its attempt to use contempt proceedings to force a mental examination on Judge McBryde, and announced that the five-judge committee would hold an evidentiary hearing on the complaints. The hearing was eventually set for August 1997. In May and June, counsel for the committee advised Judge McBryde's attorneys that the committee was expanding its investigation beyond the complaints. On July 2, 1997, the Fifth Circuit issued its opinion in *In re McBryde*, endorsing the reasonableness of Judge McBryde's conduct in *Satz* and *Torres*. Far from dissuading the committee from proceeding against Judge McBryde, the decision had the opposite effect: On July 25, 1997, with the hearing a month away, the committee's counsel provided Judge McBryde with a list of dozens of new subjects to be addressed at the hearing—most involving his rulings and conduct of proceedings in cases. None was the subject of a § 372(c) complaint. As the hearing approached, even more new subjects were added to the list.

The committee received testimony and evidence in two closed sessions from August 25-29 and September 29-

October 2, 1997. The wide-ranging testimony was not confined to subjects of which Judge McBryde had notice. The committee's witnesses critiqued rulings Judge McBryde had made throughout his judicial career and told of the reactions of lawyers to his decisions and procedural rules. Judge McBryde was examined about why he made particular rulings, what consideration he gave to their impact on lawyers and litigants, his motives and justifications for deciding as he did, and his reasons for not making alternative rulings. A psychiatrist retained by the committee attended all the proceedings, which were otherwise closed to all but the committee, witnesses, counsel and Judge McBryde.

On December 4, 1997, the committee issued a 159-page report recommending sanctions against Judge McBryde. App. 163a-301a. After giving Judge McBryde only 11 days to respond, the Council met to consider the report on December 17, 1997, and 14 days later issued an order finding Judge McBryde's conduct "prejudicial to the effective and expeditious administration of the business of the courts." App. 160a. It imposed three sanctions: a one-year suspension of new case assignments; a three-year suspension from cases involving particular attorneys; and a damning public reprimand. Without ruling on any complaint or specifying exactly what conduct it was punishing, the order labeled Judge McBryde "arbitrary," "abusive," and "intimidating" and stated that he had "imposed unwarranted sanctions on lawyers" and "repeatedly and unjustifiably attacked individual lawyers, groups of lawyers, and court personnel." *Id.* The order adopted the committee report "[t]o the extent relevant to the action taken." App. 159a.

The report, in turn, made clear that Judge McBryde was punished in large measure based on disagreement with his exercise of the judicial functions of deciding issues properly before him, making findings relevant to those issues, and implementing rules and procedures for the control of participants in proceedings before him. For example:

(a) The "unwarranted sanctions" included: (i) sanctions against two Assistant U.S. Attorneys based on Judge McBryde's finding that they had failed to engage in good-faith settlement discussions (sanctions that the government successfully appealed) (App. 194a-99a); (ii) a coercive civil contempt sanction against an attorney who had refused to disclose nonprivileged information in response to Judge McBryde's order that he do so (an order the Fifth Circuit sustained) (App. 210a-13a); (iii) a sanction imposed on an attorney who violated orders governing settlement conferences (a sanction from which no appeal was ever taken) (App. 179a-83a); and (iv) a matter in which Judge McBryde was still considering at the time of the committee report whether to sanction a lawyer for violating an order (and in which he ultimately decided that sanctions were *not* warranted) (App. 239a-46a).

(b) The "attack" on "court personnel" referred to Judge McBryde's orders addressing the conduct of the Clerk of the Northern District in the *Torres* case, orders that the Fifth Circuit had found to be reasonable in *In re McBryde*. App. 223a-28a; App. 334a.

(c) The "attacks" on individual lawyers included: (i) Judge McBryde's statement in a settlement conference that "I think the SEC is negotiating in bad faith. I think the SEC is in violation of the local rule that requires good-faith settlement negotiations" (App. 176a); (ii) Judge McBryde's statement to an Assistant U.S. Attorney that he disapproved of "a cat and mouse approach to discovery" and that "I am a little bit disappointed in the way it was handled" (App. 206a, J.A. 907); (iii) Judge McBryde's finding (conceded to be correct by one of the AUSAs involved) that statements made on behalf of the government in a sentencing reduction matter were false (App. 228a-32a); and (iv) findings and rulings made by Judge McBryde in *Satz*, which the Fifth Circuit found "cogent" and "legitimate" in *In re McBryde* (App. 218a-23a; App. 333a-34a).

(d) The "attacks" on "groups of lawyers" included comments made by Judge McBryde in two separate hearings that he was disappointed in the conduct of attorneys in the civil section of the U.S. Attorney's Office and in the Federal Public Defender's Ofice, respectively. App. 196a, 179a.

(e) The "arbitrary," "abusive," and "intimidating" labels were based on rulings such as those just described as well as Judge McBryde's conduct of trials and other courtroom proceedings—*e.g.*: (i) his requirement that parties and witnesses wear jackets and ties in jury trials; (ii) his prohibition on newspapers in the courtroom; (iii) an occasion when he had an attorney escorted from the courtroom after the attorney repeatedly interrupted proceedings in an effort to have his case called out of turn (App. 235a-39a); (iv) an incident when Judge McBryde had a staff member tell a state court judge and his court reporter they were not welcome at an in-chambers pretrial conference that did not involve them (App. 213a-18a); and (v) trial procedural rulings such as time limits on opening and closing statements and voir dire, requirements that agreed facts be stipulated and not be the subject of testimony, and enforcement of rules against argumentative openings, repetitive questioning and cross-examination beyond the scope of direct (App. 251a-63a).

Judge McBryde sought review by the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders. In September 1998, the Review Committee upheld the sanctions. The Review Committee rejected the judge's contention that the Council had exceeded its authority by sanctioning him for matters that were not subjects of complaints under 28 U.S.C. § 372(c)(1), but it acknowledged that "the lion's share" of the findings "concerned matters not raised in those complaints." App. 132a. The Review Committee also rejected Judge McBryde's argument that the Council had improperly sanctioned him based on its disagreement with his procedural and substantive judicial rulings. Entering the realm of metaphysics, the Review Com-

mittee held that "[t]he sanctions are not based upon the legal merit of the judge's orders and rulings on the bench, but on the pattern of conduct that is evidenced by those orders and rulings." App. 143a.

Although Judge McBryde also raised constitutional claims that the proceedings against him violated separation of powers, infringed judicial independence, and denied him due process, the Review Committee said it could not address them because constitutional issues were beyond its competence and such matters were for a court. App. 150a-51a. The Review Committee acknowledged, however, that no court had ever adjudicated the constitutionality of a suspension order under § 372(c) and that "the instant matter is the first time this suspension sanction ... has ever been invoked." *Id.*

By the time the Review Committee ruled, the proceedings against Judge McBryde had consumed over three years. He had spent thousands of hours he otherwise would have devoted to judicial business on his defense and incurred personal legal expenses of over $1 million. When the suspensions went into effect, his judicial business dwindled to only 32 civil cases and three criminal ones by June 1999. Hundreds of cases he would have handled went to other judges.

**B.** ***The Judicial Proceedings.*** Judge McBryde filed this action against the Review Committee and Council in the U.S. District Court for the District of Columbia, invoking jurisdiction under 28 U.S.C. § 1331 and challenging the sanctions on constitutional and statutory grounds. Judge McBryde alleged: that the Council and Review Committee acted outside their authority under 28 U.S.C. § 372(c) by sanctioning him for conduct that was not the subject of any complaint and by punishing him based on the substance of his judicial rulings; and that § 372(c) is unconstitutional on its face (as a violation of separation of powers and judicial independence) and as applied to him (insofar as its application infringed his judicial independence and denied him due process). The United States intervened to defend the statute. The district court de-

nied a temporary restraining order in November 1998. On December 30, 1999, the court granted summary judgment to the respondents, holding the statute constitutional on its face and as applied. Although the court held that the finality provision in § 372(c)(10) allowed it to address the constitutional claims, it ruled that that provision prevented consideration of Judge McBryde's statutory arguments. App. 87a.

Judge McBryde appealed, and a divided D.C. Circuit panel affirmed in part and vacated in part. Because the case suspensions had expired by the time the court ruled, the panel majority first considered whether the case was moot. The majority held that the challenge to the "stigmatizing" reprimand remained alive because it inflicted continuing, serious harm on Judge McBryde. App. 6a. But the majority found Judge McBryde's challenges to the suspensions moot because their persisting stigmatizing effects were only "collateral" and were "vague and unsubstantiated." App. 7a. And although the majority recognized that temporary suspensions would tend to "evade review," it held they were not "capable of repetition" because the likelihood Judge McBryde would again be sanctioned was "fairly slight." App. 4a-5a.

The majority then considered whether consideration of Judge McBryde's claims was barred by the finality clause in 28 U.S.C. § 372(c)(10). The court recognized that "a serious constitutional question" would arise if a statute "were construed to deny any judicial forum for a colorable constitutional claim." App. 8a. Thus, "[w]hen the Constitution is invoked, a claim of preclusion faces an especially high hurdle," requiring clear and convincing evidence that Congress intended to preclude review. App. 9a (citing *Webster v. Doe*, 486 U.S. 592, 603 (1988)). The majority acknowledged that the finality clause "closely parallels" (App. 8a) the language of the preclusion clause at issue in *Johnson v. Robison*, 415 U.S. 361 (1974), where this Court held that a provision making agency decisions "final and conclusive" and denying courts power to "review any such decision" did not divest the

courts of power to hear constitutional claims. Similarly, the court recognized the similarity between § 372(c)(10) and the preclusion provision of the Federal Employees Compensation Act, 5 U.S.C. § 8128(b), which several circuits, including the D.C. Circuit, have held permits consideration of constitutional claims. App. 10a.

Nonetheless, drawing a distinction not found in any of the precedents cited, the majority held that the finality clause precluded all of Judge McBryde's as-applied constitutional claims, and permitted consideration only of facial challenges. App. 15a. Recognizing that its ruling denied any forum for Judge McBryde's as-applied claims in light of the Review Committee's holding that it could not consider them, the court confined itself to suggesting that perhaps the Review Committee might rethink the issue. App. 24a. Further, rejecting Judge McBryde's contention that the clause did not preclude review of claims that the administrative bodies had acted in clear excess of their statutory authority, the court held that it could not consider any of Judge McBryde's statutory claims. App. 17a.

The majority then turned to Judge McBryde's facial constitutional challenges to the statute's authorization of judicial reprimands—the only issues its mootness and preclusion rulings permitted it to address. Rejecting the view that Article III guarantees judges a measure of independence from other judges, the majority held that Article III insulates the judiciary only from interference by the executive and legislative branches. App. 18a. The majority also rejected Judge McBryde's separation of powers argument that the Constitution reserves to Congress authority to discipline federal judges. Although the majority acknowledged that the argument that the statute contravenes Congress' exclusive impeachment power "works well for removal and disqualification" sanctions, it held that granting bodies of judges the power to censure other judges did not threaten the constitutional allocation of powers. App. 22a.

Judge Tatel dissented in part. He concurred that the statutory authorization for judicial reprimands was not facially unconstitutional and that the statute precluded review of statutory claims, but his agreement ended there. Regarding mootness, Judge Tatel found that the continuing stigmatizing effects of the suspensions were "at least as serious" as those of the reprimand. App. 51a. Judge Tatel also would have held the suspensions "capable of repetition." He observed that while Judge McBryde was now "on notice" that his judicial actions could lead to suspension, it was "unclear precisely what kind of conduct would trigger sanctions." *Id.* "Given this uncertainty," there is "ample reason to suspect" a repetition of sanctions. *Id.* Thus, Judge Tatel concluded, the challenges to the suspensions should have been addressed.

The dissenter also rejected the majority's holding that § 372(c)(10) precluded as-applied constitutional challenges. There was, he said—and the majority had not disagreed—no language in the statute barring consideration of constitutional claims. This contrasted with other statutes that expressly bar consideration of "interpretation and application of constitutional and statutory provisions." App. 32a. The legislative history, he noted, was equally barren, and the majority's reliance on the history of prior unenacted versions of the statute was improper. App. 33a. Under such circumstances, Judge Tatel concluded, precluding as-applied constitutional challenges was contrary to Supreme Court and circuit precedent.

Judge Tatel then considered Judge McBryde's as-applied constitutional claim that the sanctions infringed judicial independence. Looking to cases such as *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871), and *Pierson v. Ray*, 386 U.S. 547 (1967), Judge Tatel argued that Article III guarantees judges "a degree of protection against interference with their exercise of judicial power"—including "interference by fellow judges." App. 38a. "A judge's authority to control the courtroom," he emphasized, "is essen-

tial to the exercise of judicial power." App. 40a. Accordingly, the Constitution permits a judge to be sanctioned "only for conduct that is *clearly* abusive or *clearly* prejudicial to the adversarial process." App. 42a. Although Judge Tatel thought some of the conduct underlying the sanctions met this standard, many of the incidents were "trivial" and the basis for the sanctions unexplained. App. 46a. Thus, Judge McBryde may have been sanctioned for "legitimate judicial behavior," and upholding "sanctions based on this record risks chilling legitimate conduct by other judges." *Id.*

Judge McBryde sought rehearing en banc. Three of the eight active judges recused. Of the remaining five, three voted for rehearing, but because a majority of active judges was required, the petition was denied. Judges Tatel and Sentelle dissented on the ground that the panel's review preclusion holding "conflicts with well-established precedent of both the Supreme Court and this circuit." App. 303a.

## REASONS FOR GRANTING THE WRIT

### I. The Court of Appeals' Holding that the Statute Precludes As-Applied Constitutional Claims Conflicts with Precedents of this and Other Courts.

The relevant part of 28 U.S.C. § 372(c)(10) reads: "Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." In holding that this statute bars as-applied constitutional claims, the panel majority paid only lip-service to binding precedents of this Court, and its holding conflicts in principle with those precedents as well as decisions of other circuits and the D.C. Circuit itself.

The panel opinion does what this Court has so far steadfastly refused to countenance: It interprets a statute to deny any judicial forum for substantial constitutional claims. This Court has consistently applied a strong presumption against review preclusion. *See, e.g., INS v. St. Cyr*, 533 U.S. 289 (2001). The presumption is heaviest when constitutional

claims are at issue because of the "serious constitutional question"—which this Court has not resolved—that would arise "if a federal statute were construed to deny any forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. at 603. Thus, this Court has held preclusion clauses at least as broad as § 372(c)(10) to allow review of constitutional and even nonconstitutional claims. *Webster*, 486 U.S. at 603; *Johnson v. Robison*, 415 U.S. 361 (1974); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 498 (1991); *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Lindahl v. OPM*, 470 U.S. 768 (1985).

The panel majority's restriction of this principle to facial constitutional challenges finds nc support in this Court's precedents. *Webster* itself permitted review of an as-applied claim in the face of a sweeping preclusion provision. Moreover, the panel majority mustered no support in the language or history of the statute to support the notion that Congress clearly intended to preclude as-applied challenges while *permitting* facial ones. Indeed, if the avoiding-constitutional-doubt rationale supports permitting judicial review of the constitutionality of acts of Congress, it follows even more strongly that the acts of administrative bodies can fare no better. Congress could hardly have intended to allow judicial review of its own actions but leave subordinate bodies free to trample constitutional rights without judicial oversight.

The panel majority's review preclusion decision conflicts not only with this Court's precedents, but also with a host of court of appeals decisions permitting review of as-applied constitutional challenges in the face of review preclusion statutes. For example, the panel majority recognized that the finality language in § 372(c)(10) was "quite similar" (App. 10a) to that of 5 U.S.C. § 8128(b).[1] Strikingly, the courts of

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[1] Section 8128(b) provides that agency actions under the Federal Employees Compensation Act are "final and conclusive for all purposes

*(footnote continued)*

appeals have recognized that, under the reasoning of *Webster* and its predecessors, § 8128(b) *cannot* be read to preclude review of as-applied constitutional claims. *Czerkies v. Dept. of Labor*, 73 F.3d 1435, 1439 (7th Cir. 1996) ("If Czerkies cannot maintain this suit, he has no administrative or judicial forum in which to litigate his claim that he was denied his constitutional right to due process of law."); *Brumley v. Dept. of Labor*, 28 F.3d 746, 747 (8th Cir. 1994); *Woodruff v. Dept. of Labor*, 954 F.2d 634 (11th Cir. 1992); *Owens v. Brock*, 860 F.2d 1363, 1367 (6th Cir. 1988); *Paluca v. Secretary of Labor*, 813 F.2d 524, 525 (1st Cir. 1987); *Rodrigues v. Secretary of Labor*, 769 F.2d 1344, 1347-49 (9th Cir. 1985).

While the rehearing petition was pending in this case, the D.C. Circuit itself held in *Lepre v. Dept. of Labor*, 275 F.3d 59 (D.C. Cir. 2001), that § 8128(b) does not bar as-applied constitutional claims. *Lepre* is only the latest D.C. Circuit opinion at odds with the preclusion holding in this case. *See, e.g., Griffith v. FLRA*, 842 F.2d 487, 494 (D.C. Cir. 1988); *Ungar v. Smith*, 667 F.2d 188, 193 (D.C. Cir. 1981); *Ralpho v. Bell*, 569 F.2d 607, 620 (D.C. Cir. 1977) ("[It] beggars the imagination to suggest that judicial review might be less crucial to assuring the integrity of administrative action than it is to make certain that Congress will operate within its proper sphere," and "[i]f the courts are disabled from requiring administrative officials to act constitutionally, it is difficult to see who would perform that function."). Indeed, the D.C. Circuit's own previous decisions concerning the Judicial Conduct and Disability Act had recognized that "sensitive and unsettled questions of constitutional law would arise if the challenged actions are covered by the prohibition on judicial review." *Hastings v. Judicial Conference*, 829 F.2d 91, 108 n.69 (D.C. Cir. 1987); *see also Hastings v. Judicial Conference*, 770 F.2d 1093, 1109-10 (D.C. Cir. 1985) (Edwards,

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and with respect to all questions of law and fact" and are "not subject to review ... by a court by mandamus or otherwise."

J., concurring) ("If, however, section 372(c)(10) is interpreted to bar all judicial review of claims of illegality in the decisionmaking process, ... the constitutionality of the Act's combination of investigative and adjudicative powers in the same bodies would be called into serious question.").

The panel majority, however, cut off judicial consideration of constitutional claims without resolving the "serious constitutional questions" its action posed. This Court should review the preclusion ruling because it is contrary to this Court's precedents; because its incompatibility in principle with decisions of other circuits and the D.C. Circuit itself reveals a need for further guidance from this Court on the important and recurring issue of the circumstances in which constitutional claims may be statutorily precluded; because it effectively denies *any* forum for weighty constitutional issues of judicial independence and due process posed by the extraordinary sanctions imposed on Judge McBryde; and because it places before the Court the fundamental, unresolved question whether judicial consideration of substantial constitutional claims may constitutionally be foreclosed.

## II. This Court Should Determine Whether the Constitutional Principle of Judicial Independence Permits Sanctioning a Judge Based on Disagreement with His or Her Judicial Acts.

The panel majority's preclusion analysis enabled it to sidestep one of the most disturbing and important constitutional issues presented by this case: Whether it is consistent with the constitutional principle of judicial independence to allow the Judicial Conduct and Disability Act to be applied to permit groups of judges acting as administrators to punish an Article III judge based on his philosophy and methods of judging and the merits of his decisions in particular matters. As Judge Tatel recognized, rejection of the panel majority's flawed preclusion analysis brings this issue squarely to the forefront, because there is no room for doubt that the punishment of Judge McBryde rested largely on disapproval of

particular rulings on procedural and substantive matters as well as his practices in regulating proceedings in his courtroom. Because of its fundamental importance to the administration of justice in the federal courts, this Court should consider Judge McBryde's as-applied constitutional claim that the sanctions violate the principle of judicial independence.[2]

Article III "unambiguously enunciates a fundamental principle – that the 'judicial Power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. at 60. *See also Chandler v. Judicial Council*, 398 U.S. 74, 84 (1970) ("There can, of course, be no disagreement . . . as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function."). As Alexander Hamilton wrote:

> [The] independence of the judges is . . . requisite to guard the Constitution and the rights of individuals [against legislative encroachments and] from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among people. . . .

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[2] Unless this case were completely resolved in Judge McBryde's favor on the merits of the judicial independence, separation of powers, or statutory arguments presented herein, rejection of the majority's preclusion analysis would also require remand for consideration of Judge McBryde's evidence-intensive due process claim. The record establishes his entitlement to summary judgment on that ground, which involves bias on the part of the adjudicators and the inappropriate combination of the roles of complainant, investigator, prosecutor, grand jury, and adjudicator in those who sanctioned him, as well as inadequate notice of the charges against him and other pervasive irregularities. *See In re Murchison*, 349 U.S. 133, 136 (1955); *Wildberger v. AFGE*, 86 F.3d 1188, 1196 (D.C. Cir. 1996); *Tincher v. Piasecki*, 520 F.2d 851, 855 (7th Cir. 1975).

THE FEDERALIST NO. 78, at 469 (C. Rossiter ed. 1961). "The guarantee of life tenure insulates the individual judge from improper influences not only by other branches *but by colleagues as well*, and thus promotes judicial individualism." *Northern Pipeline*, 458 U.S. at 59 n.10 (emphasis added).

As the Fifth Circuit noted in *In re Clay*, when judges intrude into the judicial affairs of a fellow judge they chill the individualism essential to Article III judicial independence:

> [Article III's] guarantees insure independence from legislative and executive influence, promote public confidence in judicial integrity, attract well qualified jurists to the bench, and insulate judges from pressure by other judges. . . . Courts and commentators focus on the importance of insulating judges from Congress and the Executive Branch. But as Chief Judge Kaufman noted, "it is equally essential to protect the independence of the individual judge, even from incursions by other judges. The heart of judicial independence, it must be understood, is judicial individualism," and giving one judge power over another chills judicial individualism. Irving R. Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681, 713 (1979).

35 F.3d 190, 192 (5th Cir. 1994) (internal citations omitted).

Whether the principle of judicial independence can be squared with attempts to control a judge's decisionmaking through sanctions imposed by committees of federal judges rather than through the appellate process is a significant and unresolved issue. The previously decided case nearest in point is the Fifth Circuit's decision in *In re McBryde* (App. 315a-58a), which addressed the actions taken against Judge McBryde by the chief judge of his court and the Judicial Council based on his judicial actions in *Satz* and *Torres*. Fearing the chilling effects of such sanctions on judicial independence, the court in that case strongly affirmed that "[a] trial judge should not fear that because of comments he or she makes from the bench, which in good faith the judge

feels are related to the proceeding before the court, he or she ultimately may be subject to a disciplinary sanction by the Judicial Council." App. 356a (citation omitted). Holding the sanctions unlawful, the Fifth Circuit said that they "threatened the proper functioning of the judicial process" and "the very structure of the federal court system" (App. 342a), and that the taking of those actions due to a disagreement with Judge McBryde's rulings was "antithetical to and incompatible with the structure of the federal judicial system" (App. 346a). Those actions against Judge McBryde in 1995 pale in comparison to the investigation of his entire judicial career, the intimidating threats of psychiatric evaluation, and the punishment meted out because of disapproval of his philosophy and methods of judging and the merits of his decisions.

Moreover, to say, as the Review Committee did, that the punishments imposed on Judge McBryde were based on a "pattern" of his judicial actions only exacerbates the problem. That assertion pointedly emphasizes the danger of what happened to Judge McBryde. His judicial independence as an Article III judge was eroded both by the investigation into the judicial findings, rulings, and orders he made and procedural rules he applied throughout his career (an investigation that required him, years after the fact, to submit to questioning, under the watchful eye of a psychiatrist, about why he took each questioned action), and by the ensuing punishment, including temporary impeachment, *see United States v. Anderson*, 160 F.3d 231, 237 (5th Cir. 1998) (Jones, J., dissenting), he received based on disapproval of his judicial conduct. Permitting judicial administrative bodies to sift through the judicial actions of a judge throughout his or her career in search of a "pattern" they find unacceptable is even more destructive of the judge's independence than is an inquiry into the merits of individual rulings.[3]

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[3] Indeed, the severe financial burdens that the defense of such an investigation imposes on an Article III judge themselves severely under-

*(footnote continued)*

Judge McBryde was punished because judicial actions that accorded with his strict style of courtroom management offended or intimidated attorneys or crimped their courtroom styles. The next case could be one where the "pattern" found administratively unacceptable by the judicial hierarchy is a tendency to rule in favor of defendants or the government on Fourth Amendment issues; or a tendency to favor or disfavor civil rights plaintiffs or habeas petitioners; or a philosophy that tends to favor or disfavor a particular theory of recovery or type of legal action. The potential for mischief is infinite. That the judge in any of these illustrations was doing what he or she honestly thought the law and facts required would make no difference if the administrators to whom the judge were answerable happened to hold judicial views different from the judge's.

If the as-applied judicial independence challenge is not sustained, the concept of judicial independence of Article III judges as it has been known for two centuries will be irreparably damaged. Recently, the independence of the federal judiciary has faced serious challenges—including partisan political criticisms of nominees in the confirmation process, and outcries against rulings that do not conform to the desires or expectations of discrete groups or ideological movements. Such challenges are inherent in the constitutional provisions for advice and consent and freedom of speech. But the attack on Judge McBryde's judicial actions forms a new, and more dangerous, challenge to the independence of federal judges. Concerns that were expressed when judicial discipline legislation was under consideration will prove prescient if the holdings of the panel majority are allowed to stand:

> [N]o judge should be beholden to any other person, including other federal judges. A subservient judge is not

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mine judicial independence. *See Tashima v. Administrative Office of U.S. Courts*, 967 F.2d 1264, 1269-70 (9th Cir. 1992).

> his own man. He becomes fungible, intimidated, and dispossessed of that independent spirit which the Founders considered essential. Any such development cannot help but result in a lethal distortion of the delicate balance of power that has been largely responsible for the preservation of our essential liberties. . . . The circuit councils, like other authorities, are clearly capable of abusing their powers. And if their powers are so construed that they are able to judge their brethren on the district bench and render sanctions without meaningful restraints, the results can be disastrous to the very conception of our government.

Frank J. Battisti, *An Independent Judiciary or an Evanescent Dream?*, 25 Case W. Res. L. Rev. 711, 724, 738 (1975).

**III. This Court Should Determine Whether The Judicial Conduct and Disability Act's Provisions for Disciplining Federal Judges Are Facially Constitutional.**

The panel majority limited its review of the important and unresolved question of the facial constitutionality of granting disciplinary authority over federal judges to committees of their peers by holding that the issue of the constitutionality of the suspension sanction was moot. But the majority's mootness ruling was plainly erroneous under this Court's precedents and poses no obstacle to review by this Court of the issue of the constitutionality of the Act's disciplinary provisions, which this case starkly presents for the first time, and which this Court should resolve because of its great significance to the structure of our judicial system.[4]

**A. *The Suspension Issue Is Not Moot.*** Mootness was raised *sua sponte* by the panel without briefing. Judge McBryde filed the district court action less than a month after

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[4] For the same reasons, mootness concerns do not bar the Court from considering the impact of the suspension sanctions in connection with the as-applied judicial independence challenge discussed above.

the Review Committee rendered its decision (when the one-year suspension took effect) and almost two-and-a-half years before the three-year suspension expired. The district court denied interim relief on November 2, 1998, based in part on the view that lapse of time would not harm Judge McBryde because his docket could be restored by an order reassigning cases if he ultimately prevailed. By the time the district court ruled on December 30, 1999, on motions filed in mid-November 1998, the one-year suspension had expired. The three-year suspension expired in February 2001, three months after oral argument in the D.C. Circuit.

The majority's mootness holding rests on an incorrect premise—that the reputational injury Judge McBryde suffered from his temporary impeachment is not sufficiently greater or longer lasting than, or different from, the injury caused by the reprimand to constitute a continuing collateral consequence. App. 7a. Obviously, Judge McBryde would be better off if the temporary impeachment blot were removed from his record. And his docket still suffers from the loss of hundreds of cases that were diverted to other judges because of the case suspensions. Even the panel majority recognized that "docket limitations can be a very serious matter." App. 5a. Given these circumstances, the conclusion that the suspensions have no adverse collateral consequences conflicts in principle with the holding of this Court in *Sibron v. New York* that the mere possibility of adverse collateral consequences in a criminal case is enough to preserve a case "from ending 'ignominiously in the limbo of mootness.'" 392 U.S. 40, 55 (1968) (citation omitted).

The panel majority's decision also conflicts in principle with the "capable of repetition" concept formulated by this Court in *Honig v. Doe*, 484 U.S. 305, 323 (1988). Given the vague and overbroad disciplinary standards apparently applied by the Council, Judge McBryde could again find himself subject to similar proceedings based on his exercise of proper judicial functions in the manner in which he custom-

arily carries them out. The majority's application of this principle also failed to accord proper weight to the interests of Judge McBryde, the judiciary, and the public in obtaining answers to the issues raised by the agency-imposed, temporary impeachment of an Article III judge, *see Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 516 (1911), or to the resources that have been devoted to obtaining the answers, *see Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 191-92 (2000).

Most importantly, the majority's mootness analysis overlooks that in a structural separation of powers/judicial independence challenge such as this one, the principal relevant injury is not the immediate harm caused if a power denied by the Constitution is exercised, but the "here-and-now subservience" that the threat of exercise of that power creates in one subject to it. *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986). Just as in *Washington Metropolitan Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991), the threat of suspension "hangs over [Judge McBryde] like the sword over Damocles, creating a 'here-and-now subservience' ... sufficient to raise a constitutional question." Particularly in light of having been actually subjected to the suspension sanction, Judge McBryde has had his judicial independence chilled. Like a chilling effect on constitutionally protected speech, that injury does not dissipate simply because his suspension has expired.

**B.** ***The Facial Constitutional Challenge Is Substantial and Important.*** In the Act, Congress empowered judicial agencies it created under 28 U.S.C. §§ 331 and 332 to punish an Article III judge by public censure or reprimand and withdrawal of case assignments, § 372(c)(6)(B)(iv) and (vi), upon a finding of merit in a complaint that the judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts," § 372(c)(1). Congress thus purported to delegate to agencies within the Judicial Branch powers to sanction official misconduct that can

only be exercised by Congress through the constitutional impeachment process. *See Hastings v. Judicial Conference*, 770 F.2d at 1104, 1107 (Edwards, J., concurring). The question of the constitutionality of the punitive sections of the Act at issue here was reserved in *Hastings v. Judicial Conference*, 829 F.2d at 94, 99 n.36; *Matter of Certain Complaints Under Investigation*, 783 F.2d 1488, 1508-10 (11th Cir.), *cert. denied*, 477 U.S. 904 (1986); and *Hastings v. Judicial Conference*, 770 F.2d at 1099-1100. This Court similarly reserved the question of the constitutionality of measures later incorporated in the Act in *Chandler v. Judicial Council*, 398 U.S. 74, and *Chandler v. Judicial Council*, 382 U.S. 1003 (1966) (per curiam).

While judicial precedent is lacking, commentary has been prolific. Senators Heflin, Mathias, and Laxalt thought the Act unconstitutional and dissented from the Judiciary Committee report. S. REP. NO. 96-362, at 21 (1979) ("Unlike the Legislative and Executive Branches of our government, the Judiciary was given no power [by the Constitution], either express or implied, to police its own members.") (Sen. Heflin); *id.* at 27 ("[The Act] would pose a direct and serious threat to the time-honored and constitutionally enshrined principle of judicial independence.") (Sen. Mathias); *id.* at 29 ("I believe [the Act] will chill the independence of the Federal Judiciary.") (Sen. Laxalt).

Chief Judge Irving Kaufman called a bill similar to the Act "unconstitutional, unnecessary, and, indeed, counterproductive." Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 683 (1979). Justices Black and Douglas thought the measures later incorporated into the Act clearly unconstitutional, *see Chandler*, 398 U.S. at 129-41, 141-43 (dissenting opinions); *Chandler*, 382 U.S. at 1004-06 (dissenting opinion). Chief Judge Edwards expressed serious doubts about the Act's constitutionality, *see Hastings*, 770 F.2d at 1104 (concurring opinion) ("What is even more curious to me is the apparently unquestioning acceptance by the

judiciary of an act that may, in part, be significantly at odds with our basic constitutional structure and previously inviolate principles of separation of powers."); Harry T. Edwards, *Regulating Judicial Misconduct and Divining Good Behavior for Federal Judges*, 87 MICH. L. REV. 765, 787-93 (1989).

Many academics, finally, have called the Act unconstitutional. *See, e.g.*, Letter from Prof. Gerald Gunther to Sen. Charles Mathias, *reprinted in Hearings before the H.R. Subcomm. on Courts of the Comm. on the Judiciary,* 96th Cong., 1st & 2d Sess. 218-19 (1980); L. Baker, *Unnecessary and Improper*, 94 YALE L.J. 1117, 1138-39 (1985); M. Freedman, *Removal and Discipline of Federal Judges*, 31 MERCER L. REV. 681 (1980); P. Abrams, *Spare the Rod and Spoil the Judge?*, 41 DEPAUL L. REV. 59 (1991); *see also* P. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969).

After cataloging the criticisms and defenses of the Act, Professor Michael Gerhardt observed:

> [T]o be meaningful, article III's guarantees must protect judges not only collectively from other branches, but also individually from harassment by other judges (even for misconduct that may arguably be the basis for an impeachment). Absent protection for the independence of individual federal judges from coercion from within as well as from without the judiciary, judicial independence becomes highly unlikely. By empowering federal judges to initiate complaints and investigations against other federal judges and by formalizing the complaint procedure, the Act increases the potential for some federal judges to intimidate and harass others. Indeed, many sitting judges have expressed their concern "that the provisions of the Act might be subject to abuse – that they might be misused to pressure or intimidate the nonconformist, the judge whose judicial style or legal philosophy are [sic] repugnant to the majority of his or her colleagues."

Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 73-74 (1989) (quoting *Hastings v. Judicial Conference*, 770 F.2d at 1107 (Edwards, J., concurring)).

By its mootness decision, the panel majority avoided the facial constitutional challenge to case suspension authority. However, it virtually conceded that the separation of powers contention might be meritorious if the case suspensions were considered, explaining that: (i) "We recognize that docket limitations can be a very serious matter," (App. 5a); (ii) "[T]he most we could say at McBryde's behest is that in imposing and affirming the suspension sanction the Judicial Council and Review Committee performed acts reserved by the Constitution to the House and a two-thirds majority of the Senate," (App. 7a); and, (iii) "[T]he claim of implied negation from the impeachment power works well for removal or disqualification. But it works not at all for the reprimand sanction, which bears no resemblance to removal or disqualification and is the only sanction in the case that remains unmoot" (App. 22a).

Furthermore, the majority's emphasis on the notion that Article III judicial independence is to protect the Judicial Branch from incursions by the Executive and Legislative Branches fails to give proper weight to the need for individual judicial independence, which this Court, other courts, and commentators have concluded has Article III stature. *See supra* at 15-20. Even if the majority were correct in emphasizing independence from the other branches, its discussion fails to recognize that the Act *is* an incursion by the Legislative Branch into the affairs of the Judicial Branch. The agencies that administer the Act were created by Congress, and it is Congress that has instructed them to impose on judges the punishments the Act authorizes.

The petition should be granted so that this Court can resolve these constitutional issues of exceptional importance.

## IV. The Court Should Define the Statutory Limits on Judicial Council Authority under the Judicial Conduct and Disability Act.

The court of appeals held that 28 U.S.C. § 372(c)(10) barred Judge McBryde's claims that the sanctions clearly exceeded the agencies' statutory authority. Because the panel's statutory preclusion analysis is inconsistent with governing principles of this Court's cases, and because both the preclusion issue and the merits of Judge McBryde's statutory claims present issues important to the administration of the Act, review of these issues together with the constitutional issues is appropriate. Such review will clarify the scope of Council authority and judicial review under the Act—matters of great significance to the federal judiciary. Taking up these issues may also allow the Court to avoid some of the constitutional issues posed by the Council's excesses.

**A.** ***The Preclusion Issue.*** This Court has consistently held that when an administrative body acts in clear excess of statutory authority, there is a powerful presumption in favor of judicial review. This principle found early expression in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), where the Court held that courts "must have power in the proper proceeding to grant relief" against actions wholly lacking in statutory authority, for "[o]therwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual." *Id.* at 109-10.

The Court followed *McAnnulty* in *Leedom v. Kyne*, 358 U.S. 184 (1958), which held that the NLRA's limits on judicial review of NLRB orders did not preclude a court from hearing a claim that the Board had acted in excess of its delegated powers. The Court stated that "[t]his Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190. The Court has applied this

principle even in the face of an otherwise uncompromising statutory bar to review. In *Oestereich v. Selective Service System*, 393 U.S. 233 (1968), the relevant statute "unambiguous[ly]" provided that "no judicial review shall be made" of the agency's action. *Id.* at 235. This Court nevertheless held that the courts had the power to review a clear departure by the agency from its statutory mandate. *Id.*

The panel majority's refusal to hear Judge McBryde's claim that the Council and Review Committee acted beyond their statutory jurisdiction conflicts in principle not only with this Court's precedents, but also with the Sixth Circuit's decision in *Wayne State University v. Cleland*, 590 F.2d 627, 631-32 (6th Cir. 1978) (holding that a finality clause at least as broad as § 372(c)(10) did not preclude challenge to an agency's statutory authority). Moreover, it conflicts with decisions of the D.C. Circuit itself. That court has consistently held that it will decline review of "'basically lawless' agency action only when clearly instructed to do so," and that "such a drastic restraint on judicial inquiry" requires Congress to "ma[k]e its intentions plain." *Ralpho*, 569 F.2d at 623, 625. Similarly, in *Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988), the court said that "[j]udicial review is favored when an agency is charged with acting beyond its authority" and will be withheld "only upon a clear and convincing showing of a contrary legislative intent." *Id.* at 221, 225. Other D.C. Circuit rulings with which the panel decision conflicts on this point are *U.S. Department of Treasury v. FLRA*, 43 F.3d 682, 688-90 (1994), *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 664 (1994), and *Gonzalez v. Freeman*, 334 F.2d 570, 575 (1964).

**B.** ***The Merits.***

1. ***The Act Does Not Authorize Punishment for Judicial Decisions and Rulings.*** The overwhelming majority of the Committee's evidence was testimony critical of Judge McBryde's judicial actions. The cross-examination of Judge McBryde was devoted almost entirely to questions about the

propriety of his rulings, whether he would rule the same way if he had it to do over again, and whether he considered the effect his decisions would have on lawyers and others. He was punished because the Council thought his judicial decisions, rulings, and rules were unreasonable or oppressive.

The Act does not authorize such proceedings. It provides for dismissal of complaints that are "directly related to the merits of a decision or procedural ruling." § 372(c)(3)(a)(ii). Legislative history confirms that the Act "*does not encompass complaints relating to the merits* of any decision or procedural ruling of a judge." S. REP. NO. 96-362, at 6. Even the district court recognized that "[o]n its face . . . the Act clearly precludes review of a judge's judicial decisions." (App. 82a). Other judges addressing the issue have reached the same conclusion. *E.g.*, *Matter of a Charge of Judicial Misconduct*, 141 F.3d 333, 336 (D.C. Cir. Jud. Council 1998); *In re McBryde* (App. 355a); *Duckworth v. Department of the Navy*, 974 F.2d 1140, 1141 (9th Cir. 1992).

The Review Committee, while acknowledging its lack of power to sanction Judge McBryde based on the merits of his decisions and procedural rulings (App. 143a), insisted that he was sanctioned for a "pattern" of decisions and rulings. *Id.* But the Council and Review Committee could not have evaluated the propriety of a "pattern" of decisions without evaluating the propriety of each. And sanctioning Judge McBryde for a "pattern" of judicial actions necessarily punishes him for the rulings included in the "pattern." The propriety of such sanctions is an important, unresolved issue under the Act that this Court should definitively decide.

**2. *The Act Does Not Authorize Punishment for Conduct Not the Subject of a Complaint.*** The Act sets forth a complaint-driven procedural scheme. It provides expressly for the filing of complaints (§ 372(c)(1)), for their handling by the circuit clerk and chief circuit judge (§§ 372(c)(2) & (3)), for dismissal of frivolous or merits-related complaints (§ 372(c)(3)), for notice to the subject judge and referral to an

investigating committee (§ 372(c)(4)), for investigation of and hearings on complaints (§§ 372(c)(5) & (11)), and for the disposition of complaints (§§ 372(c)(5), (6) & (10)). Essential to the process is a *written complaint* of misconduct or disability. The Act provides no authority for proceedings not based on a complaint.[5]

Whether filed by a complainant or identified by a chief judge, the complaint serves crucial functions. It is the vehicle for resolving the threshold question whether there is a cognizable misconduct issue. *See* § 372(c)(3). It is the means for giving the subject judge notice. *See* §§ 372(c)(2) & (4). And it defines the scope of special committee and judicial council proceedings. The Act specifically provides that a special committee is "to investigate the facts and allegations *contained in the complaint.*" § 372(c)(4)(A) (emphasis added). The investigation may be "as extensive as [the committee] considers necessary," § 372(c)(5), but it is at all times an investigation of the *allegations of the complaint*. Similarly, the disciplinary authority of the council is expressly tied to "the complaint." § 372(c)(6).

In this case, the Review Committee acknowledged that the majority of the actions for which the Council sanctioned Judge McBryde were not the subject of any complaint, either filed or "identified" by the chief circuit judge. Conversely, the Council essentially ignored all the "complaints." Nothing in the Act provides the Council a roving commission to punish a judge for rulings issued and procedures a judge throughout his career simply because an unrelated complaint has been filed or identified against him.

Now that the Council and Review Committee have set a precedent for punishing an Article III judge based on judicial

---

[5] The Act permits a chief circuit judge to initiate proceedings absent a properly filed complaint only if he or she "identifies" a complaint and give written reasons for so doing. § 372(c)(1). Under this procedure, too, the written complaint remains the basis for all subsequent proceedings.

actions of the judge throughout his judicial career, which were not the subject of any § 372(c)(1) complaint, there is urgency in a decision of this Court that, in doing so, the agencies acted beyond the scope of their statutory authority.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 2002

(2)

Supreme Court, U.S.
FILED

No. 011778 JUN 3 2001

OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

THE HONORABLE JOHN MCBRYDE,

*Petitioner*,

v.

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## APPENDIX

**(Vol. I of II)**

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**APPENDIX A**

United States Court of Appeals
for the District of Columbia Circuit

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Argued November 7, 2000 Decided September 21, 2001

No. 00-5016

THE HONORABLE JOHN H. MCBRYDE,
UNITED STATES DISTRICT JUDGE FOR THE
NORTHERN DISTRICT OF TEXAS,
APPELLANT,

v.

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND
DISABILITY ORDERS OF THE JUDICIAL CONFERENCE OF THE
UNITED STATES, ET AL.,
APPELLEES.

---

Appeal from the United States District Court
for the District of Columbia
(No. 98cv02457)

---

Before: WILLIAMS and TATEL, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Separate opinion filed by *Circuit Judge* TATEL, concurring in part and dissenting in part.

WILLIAMS, *Circuit Judge*:

On December 31, 1997 the Judicial Council of the Fifth Circuit (the "Judicial Council" or "Council"), acting under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c) (the "Act"), imposed sanctions on the Honorable John H. McBryde, United States District Judge for the Northern District of Texas. The sanctions followed a two-year investigation by a Special Committee of the Judicial Council ("Special Committee"), including nine days of hearings. The Committee took evidence relating to incidents spanning the entirety of Judge McBryde's judicial career and involving encounters with judges and lawyers both inside and outside his courtroom. (We will consider an example from the exhaustive record when we address Judge McBryde's argument that the Council illegally considered the merits of his judicial decisions.)

The investigation culminated in a 159-page report in which the Special Committee concluded that "Judge McBryde ha[d] engaged for a number of years in a pattern of abusive behavior" that was "'prejudicial to the effective and expeditious administration of the business of the courts.'" *Report of the Special Committee of the Fifth Circuit Judicial Council Regarding Complaints Against, and the Investigation into the Conduct of, Judge John H. McBryde* at 150-51 (Dec. 4, 1997) ("Committee Report") (quoting 28 U.S.C. § 372(c)). The Report also recommended a variety of sanctions based on the provisions of § 372(c)(6)(B): that Judge McBryde receive a public reprimand, pursuant to subsection (v); that no new cases be assigned to him for a year, pursuant to subsection (iv); and that he not be allowed for three years to preside over cases involving any of 23 lawyers who had participated in the investigation, pursuant to subsection (vii) (providing for "other action" considered appropriate in light of circumstances). See Committee Report at 152-58. The Judicial Council endorsed the recommendations and issued an order imposing the recommended sanctions. See *In re: Matters Involving United States District Judge John H. McBryde, Under the Judicial Conduct and Disability Act of 1980,* No. 95-05-372-0023 (Jud. Council 5th Cir. Dec. 31, 1997) ("Judicial Council Order"). The lawyer-related disqualification

became effective on February 6, 1998, but the Council stayed the reprimand and the one-year suspension pending review by the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States (the "Review Committee"). On September 18, 1998 the Review Committee substantially affirmed the Council's action and lifted the stay. See *In re: Complaints of Judicial Misconduct or Disability,* No. 98-372-001 (Jud. Conf. U.S. Sept. 18, 1998) ("Judicial Conference Report").

Soon thereafter Judge McBryde brought suit in district court, claiming that the Act, both facially and as applied, violated the due process clause and the Constitution's separation of powers doctrine.[1] He also claimed that the initiation and conduct of the investigation against him exceeded the authority granted by the statute. Finally, he posed a First Amendment challenge to the Act's restrictions on disclosing the record of the proceedings. On cross motions for summary judgment, the district court agreed with Judge McBryde's First Amendment argument, *McBryde v. Committee to Review Circuit Council Conduct and Disability Orders,* 83 F. Supp. 2d 135, 171-78 (D.D.C. 1999), but rejected the rest. Only Judge McBryde appealed; here he repeats the essence of his remaining arguments.

Judge McBryde's claims are moot insofar as they distinctively relate to the one-year suspension, which expired on September 18, 1999, and the three-year disqualification, which expired on February 6, 2001. Certain of the non-moot claims are barred by the Act's preclusion of judicial review, 28 U.S.C. § 372(c)(10), namely the "as applied" and statutory challenges; the district court was therefore without jurisdiction to hear them. We vacate the district court's judgment insofar as it addressed the moot or precluded issues. Judge McBryde's remaining constitutional challenges fail on their merits; we therefore affirm the

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[1] Defendants/Appellees in this case are the Review Committee; Judge William J. Bauer, individually and as Chairman and as member of the Review Committee; the Judicial Council; and Judge Henry J. Politz, individually and as Chief Judge of the Court of Appeals for the Fifth Circuit and as presiding member of the Judicial Council, at the relevant times.

district court's ruling. We address first mootness, then preclusion, and finally the merits.

* * * * * *

Article III, Section 2 of the Constitution permits federal courts to adjudicate only "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988). If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot. See, e.g., *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992). This requirement applies independently to each form of relief sought, see *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 185 (2000), and "subsists through all stages of federal judicial proceedings, trial and appellate," *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990).

The one-year and three-year bans have expired. No relief sought in this case would return to Judge McBryde the cases he was not assigned or otherwise improve his current situation. These claims will therefore be moot unless they are "capable of repetition, yet evading review." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Both the Supreme Court and this court have held that "orders of less than two years' duration ordinarily evade review." *Burlington Northern R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 690 (D.C. Cir. 1996); see also *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514-16 (1911). So the one-year exclusion safely qualifies. We will assume in Judge McBryde's favor the same for the three-year exclusion.

But are the injuries "capable of repetition"? Stated more formally, this requires "a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein*, 423 U.S. at 149. When considering the likelihood that an injury will be repeated, the Supreme Court has in general "been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." *Honig*, 484 U.S. at 320 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983); *Murphy v. Hunt*, 455 U.S. 478, 484 (1982); *O'Shea v. Littleton*, 414 U.S.

488 (1974)). *Honig* created an exception to this general principle on the ground that there it was the disabled respondent's "very inability to conform his conduct to socially acceptable norms that render[ed] him 'handicapped.'" 484 U.S. at 320. We have no basis for concluding that there is any parallel inability here.

In the cases cited by *Honig* the parties did not challenge the underlying laws that proscribed their potential future conduct. See, e.g., *O'Shea,* 414 U.S. at 496-97. Judge McBryde obviously does challenge the Act and the *authority* of the defendants to enforce norms of judicial conduct. But he does not appear to challenge the norms themselves. To be sure, he asserts that the Special Committee's report is vague and provides inadequate notice of what actions are prohibited. But the fundamental standard sought to be enforced by the defendants can plainly be discerned – that a judge should demonstrate at least a modicum of civility and respect towards the professionals with whom he or she works. The standard is also familiar, as it clearly echoes Canon 3(A)(3) of the Code of Judicial Conduct for Federal Judges. See Code of Judicial Conduct for United States Judges, Canon 3(A)(3); Judicial Council Order at 2. Judge McBryde does not, so far as we can determine, ever challenge this basic notion anymore than the plaintiff in *Lyons* claimed a right to engage in the sort of conduct that (he said) commonly led to police use of chokeholds. Indeed at oral argument counsel for Judge McBryde specifically acknowledged that at least some of the conduct "could be considered inappropriate." See Oral Arg. Tr. at 80-81. With this decision's confirmation of the Judicial Council's authority to sanction Judge McBryde for consistent failure to adhere to this norm, we think the risk of recurrence fairly slight. We recognize that docket limitations can be a very serious matter. See *Wozniak v. Conry,* 236 F.3d 888, 890 (7th Cir. 2001) (holding that depriving a tenured professor of *all* teaching and research responsibilities affected a property interest sufficiently to entitle him to some kind of a hearing). But here the two restrictions on Judge McBryde's docket have become moot.

The dispute over the public reprimand, however, remains alive. Any thought that the reprimand is a past and irreversible

harm is belied by the fact that it continues to be posted on the web site of the Fifth Circuit Court of Appeals,[2] with a link on the home page alongside items for current use such as the court's calendar and opinions.[3] Even absent that use of modern technology it would be a part of the historical record. Were Judge McBryde to prevail on the merits it would be within our power to declare unlawful the defendants' issuance of stigmatizing reports and thereby to relieve Judge McBryde of much of the resulting injury.

No one has suggested that this injury to reputation is not enough to afford Judge McBryde standing (the three-year limit was in effect at the time of oral argument). But we have a duty to be sure of our own jurisdiction, see *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), so we consider the question. The Court has, of course, ruled that mere injury to reputation is not enough of an impingement on a person's liberty or property interest to trigger a requirement of due process. See *Paul v. Davis,* 424 U.S. 693 (1976). But injury to reputation can nonetheless suffice for purposes of constitutional standing. Thus, in *Meese v. Keene,* 481 U.S. 465 (1987), the Court found that a politician and film distributor had standing to challenge a government agency's stigmatizing as "political propaganda" foreign films that he wished to exhibit. The Court rested not only on affidavits indicating that this branding would affect his chances for reelection, *id.* at 473-74, but also on the impact on his reputation generally, *id.* Here, the official characterization of an apparently upstanding federal judge as having "engaged for a number of years in a pattern of abusive behavior" that was "'prejudicial to the effective and expeditious administration of the business of the courts'" inflicts, we think, enough injury. Committee Report at 150-51 (quoting 28 U.S.C. § 372(c)).

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[2] See <http://www.ca5.uscourts.gov/mcbryde.htm>, last accessed on June 20, 2001.

[3] See <http://www.ca5.uscourts.gov/>, last accessed on June 20, 2001.

At some point, however, claims of reputational injury can be too vague and unsubstantiated to preserve a case from mootness. See *Advanced Management Technology, Inc. v. FAA,* 211 F.3d 633, 636-37 (D.C. Cir. 2000). Insofar as the one-year and three-year suspensions may have continuing reputational effects on top of the defendants' express reprimand, they are not enough. The legally relevant injury is only the incremental effect of a record of the suspensions (since the fact of the suspensions can no longer be remedied), over and above that caused by the Council's and the Conference's explicit condemnations. See *Friedman v. Shalala,* 46 F.3d 115, 117-18 (1st Cir. 1995). And even as to that increment the most we could say at McBryde's behest is that in imposing and affirming the suspension sanction the Judicial Council and Review Committee performed acts reserved by the Constitution to the House and a two-thirds majority of the Senate. We cannot see how this would rehabilitate his reputation. Moreover, the Supreme Court has strongly suggested, without deciding, that where an effect on reputation is a *collateral* consequence of a challenged sanction, it is insufficient to support standing or, presumably, to escape mootness. See *Spencer v. Kemna,* 523 U.S. 1, 16-17 n.8 (1998). In this circuit, when injury to reputation is alleged as a secondary effect of an otherwise moot action, we have required that "some tangible, concrete effect" remain, susceptible to judicial correction. See *Penthouse Int'l, Ltd. v. Meese,* 939 F.2d 1011, 1019 (D.C. Cir. 1991).

* * * * * *

Although the injury to Judge McBryde's reputation preserves the public reprimand from mootness and affords standing, yet another question remains about our jurisdiction. The statute enabling the Judicial Council and Review Committee to consider Judge McBryde's conduct sets out the avenues through which a judge may challenge actions taken against him. 28 U.S.C. § 372(c)(10). It allows a petition to the Judicial Conference for review of a decision of the judicial council taken under § 372(c)(6). It then appears to preclude alternative avenues of review:

> Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

28 U.S.C. § 372(c)(10). Twice in the past this provision has appeared before us, but on neither occasion did we need to resolve its meaning. See *Hastings v. Judicial Conference of the United States,* 829 F.2d 91, 107 (D.C. Cir. 1987) ("Hastings II"); *Hastings v. Judicial Conference of the United States,* 770 F.2d 1093, 1103 (D.C. Cir. 1985) ("*Hastings I*").

There are some claims that this section definitely does *not* preclude. The statutory language closely parallels that construed in *Johnson v. Robison,* 415 U.S. 361 (1974), where Congress provided that "decisions" of the Veterans Administration "on any question of law or fact" under certain laws "shall be final and conclusive," and expressly withheld jurisdiction from any court to review "any such decision." *Id.* at 365 n.5 (quoting the then-applicable version of 38 U.S.C. § 211(a)). The Court held that § 211(a) had no application to challenges to the constitutionality of the statutes in question, i.e., challenges to the decisions of Congress, not the Veterans Administration. See *id.* at 367. This interpretation allowed the Court to avoid the "'serious constitutional question'" that would be posed "if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe,* 486 U.S. 592, 603 (1988) (quoting *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 681 n.12 (1986)). Similarly, the wording of § 372(c)(10) does not withhold jurisdiction over Judge McBryde's claims that the *Act* unconstitutionally impairs judicial independence and violates separation of powers.

This leaves four claims in addition to the facial constitutional challenges. Two of these four also invoke the Constitution, challenging the actions of the defendants in applying the Act to Judge McBryde. The first claim is that the defendants inflicted their sanction without providing him due process. This claim principally involves an assertion that the whole project arose out of a conflict between himself and then-Chief Judge Politz, whose actions furthering the investigation Judge McBryde regards as "retaliation" and who, he claims, combined "investi-

gative, charging, prosecutorial and adjudicative functions." Judge McBryde argues, in effect, that he was denied due process because Judge Politz refused to recuse himself. The second constitutional claim is somewhat obscure. He argues, in essence, that the *methods* used by the Judicial Council and Judicial Conference in imposing the sanction, were particularly invasive and therefore violated judicial independence. He cites two examples. When the Review Committee amended the Judicial Council's order so as to permit reinstatement if the council found that Judge McBryde had "seized the opportunity for self-appraisal and deep reflection in good faith," Judicial Conference Report at 24, it engaged (he says) in forbidden "judicial behavior modification." And the Judicial Council's use of psychiatrists for advice on Judge McBryde's mental health, and on the possible causes of his conduct, was "fundamentally destructive of judicial independence."

Beyond these constitutional claims are two phrased by Judge McBryde as assertions that the actions of the Special Committee, the Council and the Review Committee against him were "Beyond the Agencies' Statutory Jurisdiction." One of these claims is in fact an attack on the defendants' procedures, namely an argument that although the investigative process was launched by complaints formally filed under § 372, it widened as it went on to encompass conduct not mentioned in those initial complaints. The other is a claim that the defendants were without statutory authority to investigate and penalize Judge McBryde "for" the merits of his decisions and rulings (his characterization of defendants' actions). We conclude that § 372(c)(10) bars all four challenges.

As we said, two of the claims are framed in constitutional terms. When the Constitution is invoked, a claim of preclusion faces an especially high hurdle. "[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster,* 486 U.S. at 603(citing *Robison,* 415 U.S. at 373-74). And a series of cases in this circuit have held that this special clarity is necessary even for as applied challenges. See *Griffith v. FLRA,* 842 F.2d 487, 494-95 (D.C. Cir. 1988); *Ungar v. Smith,* 667 F.2d 188, 193 (D.C. Cir. 1981); *Ralpho v. Bell,* 569 F.2d 607, 620-21 (D.C. Cir. 1977). Under

these cases, we find preclusion of review for both as applied and facial constitutional challenges only if the evidence of congressional intent to preclude is "clear and convincing." The preclusive language here is quite similar to that of 5 U.S.C. § 8128(b), which the Court singled out in *Lindahl v. OPM,* 470 U.S. 768, 779-80 & n.13 (1985), as an "unambiguous and comprehensive" preclusion of review. See also *Czerkies v. Department of Labor,* 73 F.3d 1435, 1443 (7th Cir. 1996) (Easterbrook, J., concurring). But see *id.* at 1442 (majority opinion finding jurisdiction despite § 8128(b)); *Paluca v. Secretary of Labor,* 813 F.2d 524, 525 (1st Cir. 1987) (same). But under this court's *Ralpho* trilogy, we have not regarded broad and seemingly comprehensive statutory language as supplying the necessary clarity to bar as applied constitutional claims. See *Griffith,* 842 F.2d at 490 (citing 5 U.S.C § 7123(a) (1982)); *Ungar,* 667 F.2d at 193 (citing 22 U.S.C. § 1631o(c) (1976)); *Ralpho,* 569 F.2d at 613 (citing § 2020 of the Micronesian Claims Act of 1971). In the absence of explicit statutory language barring review of constitutional challenges, the opinions studied the legislative history, finding the clear and convincing standard unsatisfied in all three cases. *Griffith,* 842 F.2d at 494-95; *Ungar,* 667 F.2d at 196; *Ralpho,* 569 F.2d at 621-22.

We pretermit the possibility that the Supreme Court's decision in *Traynor v. Turnage,* 485 U.S. 535, 542-45 (1988), postdating the last of the circuit trilogy (*Griffith*), has undermined the trilogy's premise. It may have done so by treating the *Robison* decision (source of the circuit trilogy) as deriving more from statutory language allowing review of attacks on the facial validity of the provision being applied (whether the attack was statutory or constitutional), and less from ideas of special status for constitutional claims.

Assuming arguendo the full applicability of the circuit trilogy, however, we nonetheless find the requisite clarity of preclusive intent. Of course if the trilogy is read to require magic words expressly barring as applied constitutional attacks, they are not to be found. But the legislative history manifests express concern over the *Robison* issue and what appears to have been a deliberate congressional effort to assure that in practice ample

review would occur. Congress vested the authority for implementing the Act exclusively in the hands of Article III judges, providing for initial action by one group of such judges and for review by another group. Having done so, Congress clearly meant to be understood quite literally when it said in § 372(c)(10) that orders of the Judicial Conference or relevant standing committee "shall not be judicially reviewable on appeal."

The Senate bill would have established a special Article III court for review of misconduct findings – coupled with preclusion of any other review. S. 1873, as reported out of committee and as passed by the Senate, provided for creation of a "'court of record to be known as the Court on Judicial Conduct and Disability.'" See S. 1873, 96th Cong. § 2(a) (proposed 28 U.S.C. § 372(g)(1)) (as reported to the full Senate by the Judiciary Committee on October 10, 1979). "'The Court may exercise all appropriate judicial powers incident or necessary to the jurisdiction conferred upon it.'" *Id.* The bill precluded further review of the Court's actions in language similar to that of the final version: " 'There shall be no judicial review of any order or action of the Court taken under this subsection or subsection (h).'" *Id.* (proposed 28 U.S.C § 278(i)(3)). In discussing the new Court, the Committee report said:

> A national court of stature will help to alleviate the fear and public perception of a local "whitewash" of a citizen's complaint. It will also provide a forum for a judge who believes that the council of his circuit has acted against him in an unwarranted or unfair manner. In addition, by providing this court with broad discretionary power to regulate the number of cases it wishes to hear, the provision assures that a bureaucratic, excessively formalized procedure will be avoided.

S. REP. NO. 96-362, at 3 (1980), reprinted in 1980 U.S.C.A.A.N. 4315, 4317.

In the Senate debate, Senator DeConcini introduced a report commissioned by the Judiciary Committee's staff and prepared by Mr. Johnny H. Killian. The report directly addressed the *Robison* issue. After reviewing Supreme Court authority on whether *any* right of appeal was required, the report said:

> The Supreme Court in dicta in recent cases has hinted that preclusion of judicial review of constitutional claims might raise constitutional questions, *Johnson v. Robison,* 41[5] U.S. 361, 366-67, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974); *Weinberger v. Salfi,* 422 U.S. 749, 761-762, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975), but its concern appears to be that litigants at some point have access to an Article III court, *Territory of Guam v. Olsen,* 431 U.S. 195, 201-202, 204, 97 S. Ct. 1774, 52 L. Ed. 2d 250 (1977), and the Court on Judicial Conduct and Disability would be an Article III court.

125 Cong. Rec. 30,050/1 (Oct. 30, 1979) (remarks of Sen. DeConcini).

The House version called instead for review by the Judicial Conference. When it was returned to the Senate, Senator DeConcini expressed regret that the "Court" envisaged by the Senate bill had not survived. But he recognized the close similarity between review by that "Court" and by the Judicial Conference (or a standing committee thereof):

> Today's compromise substitute amendment is at least close to what was originally envisioned by the Senate this Congress, in that a permanent, independent standing committee of the judicial conference is authorized to be established. Such a body, while not an independent review court, will provide for uniformity of decisions and the building of precedents.

126 Cong. Rec. 28,090/2 (Sept. 30, 1980) (remarks of Sen. DeConcini).

Indeed, it is not clear whether there is any material difference between the two. In both cases, of course, the persons conducting the review are exclusively Article III judges. In both cases review is discretionary. 126 Cong. Rec. 28,092/3 (Sept. 30, 1980). Speaking of the Judicial Conference review, Senator DeConcini observed: "It is envisioned that over the long term these petitions will develop into something like petitions for writs of certiorari to the Supreme Court of the United States." *Id.*

It seems fair to suppose that both houses of Congress realistically expected that the Judicial Conference would hear all *serious* claims. Indeed, explaining its rejection of the Senate proposal for a new court, the House Judiciary Committee only

expressed concern that its formal character would unduly invite complaints *against* judges and thereby threaten judicial independence:

> In essence, the Committee rejected the special court feature of S. 1873 and certain other of its features because creation of a system in which complaints against federal judges could be so easily pressed to a formal adversary accusatorial proceeding raised the dangers of a substantial chilling effect on judicial independence, as well as the danger of infliction of harm and disruption of the administration of justice.

H.R. REP. No. 96-1313, at 18 (1979). The only discussion of the matter on the floor was the observation that "[t]here is also an appellate procedure which culminates in the Judicial Conference of the United States." 126 Cong. Rec. 25,370/3 (Sept. 15, 1980) (remarks of Rep. Gudger). Thus the House's expectations for review appear to be entirely consistent with those of the Senate. Only the means for providing the review were altered, and the shift seems to be due to a greater, not lesser, solicitude for judges' constitutional rights and interests.

Later developments seem to suggest that the risks the compromise sought to constrain were indeed substantial. According to the Administrative Office of the U.S. Courts, the year ending September 30, 2000 saw 696 complaints filed under § 372(c). During the same period, 715 complaints were concluded. Chief judges dismissed 359 complaints and judicial councils dismissed 354 more. Only two resulted in public censure and 162 remain pending.[4] Defending against these claims is disruptive and potentially expensive. See App. Br. at 52. Congress sought in the Act to give the judiciary the power to "keep its own house in order" by conducting its own investigations of misconduct. See S.REP. NO. 96-362, at 11, *reprinted in* 1980 U.S.C.A.A.N. at 4325. By adding review preclusion, they limited the potential disruption, while providing for adequate review in those few cases that might require it.

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[4] See *2000 Report of the Director*, Table S-22, Report of Complaints Filed and Action Taken Under Authority of Title 28 U.S.C. Section 372(c) available online at <http://www.uscourts.gov/judbus2000/tables/s22sep00.pdf>, last accessed on June 20, 2001.

We note that the Judicial Conference committee has disclaimed authority to rule on as applied, as well as facial, constitutional challenges:

> We have no competence to adjudicate the facial constitutionality of the statute or its constitutional application to the speech of an accused judge, however inappropriate or offensive his words may be. We are not a court. Our decisions are not subject to review by the Supreme Court of the United States. We sit in review of the action of the Circuit Council. The courts of the United States are open for the adjudication of such questions.

Judicial Conference Report at 21, quoting its decision in No. 84-372-001. The committee offered no reason for this position. While we apply deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), to agencies' jurisdictional decisions, see *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 694 (D.C. Cir. 2000); *Oklahoma Natural Gas v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994), the statutory mandate to the committee appears to contain no language justifying a decision to disregard claims that a circuit judicial council has violated a judge's constitutional rights in application of the Act. See § 372(c)(10) (authorizing "review" by the Judicial Conference or a standing committee thereof). To be sure, agencies ordinarily lack jurisdiction to "'adjudicat[e] . . . the constitutionality of congressional enactments,'" *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Robison*, 415 U.S. at 368), "although the rule is not mandatory," *id.* But agencies do have "an obligation to address properly presented constitutional claims which . . . do not challenge agency actions mandated by Congress." *Graceba Total Communications, Inc. v. F.C.C.*, 115 F.3d 1038, 1042 (D.C. Cir. 1997). See also *Meredith Corp. v. F.C.C.*, 809 F.2d 863, 872-74 (D.C. Cir. 1987). We can see neither any reason why Congress would have withdrawn that power and obligation from a reviewing "agency" composed exclusively of Article III judges nor any indication that it has done so.

Thus Congress in the end enabled a sanctioned judge to seek review by Article III judges of the Judicial Conference of all claims except (presumably) facial attacks on the statute. As a

result, to read § 372(c)(10) to allow review of constitutional as-applied claims by conventional courts *as well* would generate substantial redundancy, an implausible legislative purpose. Moreover, whereas the legislative history of the statutes at issue in *Griffith* and *Ungar* reflected a "silent" or unexplained deletion of an exception for constitutional claims, see Dissent at 9-10, here Congress explained the deletion of the Senate's formal Article III court. The less formal version, the House Judiciary Committee thought, would be more protective of sanctioned judges, because the Senate solution risked generation of "formal adversary accusatorial proceeding[s]" that would "raise[ ] the dangers of a substantial chilling effect on judicial independence." H.R. REP. No. 96-1313, at 18 (1979). Although the difference in fact seems to us largely cosmetic, the House-induced change seems entirely consistent with the Senate's plan that review should cease once a single Article III panel, drawn from the Judicial Conference, had passed on the work of the sanctioning circuit.

In short, we find the evidence clear and convincing that Congress intended § 372(c)(10) to preclude review in the courts for as applied constitutional claims. Members of Congress were aware of *Robison* and more generally of doctrines presuming access to Article III review of decisions impinging on important interests. Put ultimately to a choice between review by an Article III "Court" and review by a committee of Article III judges chosen by and from the Judicial Conference, they chose the latter. They did so in order to protect judges from the "chilling" effects of unnecessary complaints, not with any expectation that the Judicial Conference would scant judges' rights.

Vesting the power to review facial attacks on the Act in the courts conforms fully to *Robison*; but reserving to the Judicial Conference committee *exclusive* authority over as applied constitutional challenges fulfills both the presumption in favor of access to Article III review of constitutional claims and the norm requiring "agencies" to avoid unconstitutional applications not mandated by Congress, at the same time as it prevents undue prolongation of the disciplinary process. Accordingly, we find that in § 372(c)(10) Congress clearly and convincingly

barred our review of Judge McBryde's claim of unconstitutional application of the Act.

We are left only with the two claims that defendants exceeded their statutory authority – the objections that the investigation impermissibly swelled beyond the scope of the initial complaints and that the Judicial Council sanctioned Judge McBryde for the merits of his decisions. Judge McBryde seeks an exception to the jurisdictional limitation for these claims under *Leedom v. Kyne,* 358 U.S. 184 (1958). But *Kyne* involved preclusion that had been *inferred* from the National Labor Relations Act, and is therefore merely an application of the familiar requirement that there be "clear and convincing evidence" of legislative intent to preclude review. See *Board of Governors v. MCorp Financial, Inc.,* 502 U.S. 32, 44 (1991) (internal citations omitted). Judge McBryde also seeks an exception allowing review under *Dart v. United States,* 848 F.2d 217 (D.C. Cir. 1988), where this court reviewed an agency action despite an explicit preclusion provision. But *Dart* stands for the exceedingly narrow proposition that a statute precluding review is limited by its language. "[T]he Veterans' Administrator cannot issue oil drilling permits – nor can the Secretary of Labor rescind television licenses – and expect to escape judicial review by hiding behind a finality clause." *Id.* at 224. Thus, in *Dart* itself we found that the Secretary of Commerce's order *reversing* an administrative law judge's decision did not enjoy the preclusion that the statute afforded an order to "affirm, modify or vacate" the ALJ's decision. See *id.* at 227-31. But *Dart* cannot mean that statutory insulation of a specific type of "order" from review is automatically ineffective whenever the complainant asserts legal error. And that is the most Judge McBryde claims here.

His complaint expansion theory is that the actions taken against him were not based on the merits of any properly filed or identified complaint, as provided for by 28 U.S.C. § 372(c)(1). Subparagraph (c)(4)(A) gives the chief judge the power to form a special committee "to investigate the facts and allegations contained in the complaint." Absent a complaint, we may assume, the Judicial Council could not make a valid order under paragraph (c)(6). Accordingly, Judge McBryde argues

that Circuit Rule 9(A), which allows a special committee to expand the scope of an investigation, is invalid; on that account, he claims, we do not have before us an "order" of the sort for which judicial review is barred by § 372(c)(10). But § 372(c)(5) explicitly gives a special committee the authority to "conduct an investigation as extensive as it considers necessary," and § 372(c)(1) states that a valid written complaint may be made by "any person." 28 U.S.C. §§ 372(c)(1) & (5). Thus Judge McBryde's objection reduces to arguments as to the exact reach of these provisions. Treating such a claim as involving a deficiency that would strip the defendants' acts of the character of "orders" for purposes of § 372(c)(10) would obliterate the section altogether.

Judge McBryde's statutory merits-relatedness claim also falls short. The Act itself is permissive when it comes to the investigation of claims that are related to the merits. The chief judge, under § 372(c)(3) "*may*" dismiss a complaint if he finds the complaint is "directly related to the merits of a decision or a procedural ruling." A finding of merits relation does not *prohibit* the chief judge from appointing a special committee and therefore does not undermine the validity of the action of the Special Committee or the Judicial Council for the purposes of § 372(c)(10). Had the Fifth Circuit Judicial Conference promulgated a rule specifically calling for the investigation of the merits of decisions, such a rule might conceivably be challenged under *Traynor,* 485 U.S. at 541-45 (allowing review of claim that an agency regulation was invalidated by a statute not committed to that agency's exclusive administration). But no such rule exists in this case, and Judge McBryde has stated his objection only in the most general terms. Nowhere does he suggest that the Judicial Council's action has the character of a rule, or suggest an exception under *Traynor,* or even suggest which statutory provision such a rule would run afoul of. Again, it is plain that the statutory error asserted (if error it be) is not the sort that under *Dart* would deprive the defendants' orders of the status of "orders and determinations" covered by § 372(c)(10), or otherwise escape its preclusive effect.

* * * * * *

Judge McBryde makes two related facial constitutional challenges that survive both mootness and preclusion. First, he reads the clause vesting the impeachment power in Congress as precluding *all* other methods of disciplining judges; on this theory, the Act violates separation of powers doctrine. Second, he says that the principle of judicial independence implicit in Article III bars discipline of judges for actions *in any way* connected to his actions while on the bench.

The issues are of course linked, as the great bulwarks of judicial independence are the guarantees of life tenure and undiminished salary during good behavior. For Judge McBryde, the fact that individual judges are the direct beneficiaries of these guarantees proves that it is the individual judge that is the relevant unit of judicial independence. While this perspective has had its supporters, see *Chandler v. Judicial Council of the Tenth Circuit,* 398 U.S. 74, 129-43 (1970) (Douglas, J., and Black, J., dissenting); *Hastings I,* 770 F.2d at 1106-07 (Edwards, J., concurring); but see Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges,* 87 MICH. L. REV. 765, 785 (1989), the cases speak almost exclusively to judicial independence from the influence or control of the legislative and executive branches. See *Mistretta v. United States,* 488 U.S. 361, 382 (1989) ("the Framers 'built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'") (quoting *Buckley v. Valeo,* 424 U.S. 1, 122 (1976)); *United States v. Will,* 449 U.S. 200, 217-18 (1980) ("[a] Judiciary free from control by the Executive and Legislature"); THE FEDERALIST No. 78 (Hamilton). After all, "Article III creates[ ] not a batch of unconnected courts, but a judicial *department* composed of 'inferior Courts' and 'one supreme Court.'" *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 227 (1995) (emphasis in original).

That individual judges are direct beneficiaries of the tenure and salary protections of Article III by itself hardly shows that the overarching purpose of these provisions was to insulate individual judges against the world as a whole (including the judicial branch itself), rather than, as the cases above indicate,

to safeguard the branch's independence from its two competitors. For support of his view Judge McBryde points to a footnote from *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), in which the Court said that the two guarantees "serve other institutional values as well," among them "insulat[ing] the individual judge from improper influences not only by other branches but by colleagues as well." *Id.* at 59 n.10. But the primary value the Court asserted was "to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government." *Northern Pipeline,* 458 U.S. at 59. The conclusion that other values are also in play is a far cry from Judge McBryde's argument that the individual judge must be constitutionally sheltered not merely from removal and salary diminution but also from lesser sanctions of every sort. Lesser sanctions are common, as the Court has noted:

> Many courts . . . have informal, unpublished rules which . . . provide that when a judge has a given number of cases under submission, he will not be assigned more cases until opinions and orders issue on his 'backlog.' These are reasonable, proper, and necessary rules, and the need for enforcement cannot reasonably be doubted.

*Chandler*, 398 U.S. at 85. As there is no basis for Judge McBryde's core assumption that judicial independence requires absolute freedom from such lesser sanctions, his two claims fall swiftly.

Judge McBryde frames his separation of powers claim as whether the Constitution "allocates the power to discipline federal judges and, if so, to which branches of government." App. Br. at 54. Finding that it allocates the power to Congress in the form of impeachment, he concludes that it excludes all other forms of discipline. But Judge McBryde's attempt to fudge the distinction between impeachment and discipline doesn't work. The Constitution limits judgments for impeachment to removal from office and disqualification to hold office. U.S. Const. art. I, § 3, cl. 7. It makes no mention of discipline generally. The Supreme Court recently observed that it accepted the proposition that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other

mode." *Christensen v. Harris County,* 529 U.S. 576, 583 (2000) (internal citations omitted). But application of the maxim depends on the "thing to be done." Here the thing to be done by impeachment is removal and disqualification, not "discipline" of any sort.

The Constitution itself preserves criminal prosecution, see U.S. Const. art. I, § 3, cl. 7 ("the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law"), and at least three circuits have held that prosecution of judges can precede impeachment. See *United States v. Claiborne,* 727 F.2d 842, 845 (9th Cir. 1984); *United States v. Hastings,* 681 F.2d 706, 710 (11th Cir. 1982); *United States v. Isaacs,* 493 F.2d 1124, 1140-44 (7th Cir. 1974). Even Justices Douglas and Black, who dissented in *Chandler* from the Court's narrowly framed denial of relief for a district judge whose colleagues had limited his case assignments, acknowledged that judges were subject to criminal prosecution. See *Chandler,* 398 U.S. at 140 ("If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress.") (Douglas, J., dissenting); *id.* at 141-42 ("[J]udges, like other people, can be tried, convicted, and punished for crimes.") (Black, J., dissenting).

Judge McBryde accepts that judges are subject to prosecution, but argues that impeachment nonetheless excludes discipline of judges *by* judges. In yet another attempt to prove his individualized idea of judicial independence, he points to Hamilton's statement in Federalist No. 79 that: "The precautions for [judges'] responsibility are comprised in the article respecting impeachments. . . . This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the *only* one which we find in our own Constitution in respect to our own judges." THE FEDERALIST No. 79 at 532-33 (Hamilton) (Jacob E. Cooke, ed., 1961) (emphasis added). But even if we assume the remark embraces not merely removal and disqualification but lesser forms of discipline, it does not seem likely to have been aimed at intra-branch constraints. Hamilton's concern with judicial independence seems largely to have been directed at the threat

from the two other branches. "I agree that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" THE FEDERALIST No. 78 at 523 (Hamilton) (Jacob E. Cooke, ed.) (quoting Montesquieu). And he famously characterized the judiciary as "the least dangerous" branch. *Id.* at 522. Thus it seems natural to read Hamilton as seeing the guarantees of life tenure and undiminished compensation, and the limited means for denying a judge their protection, simply as assuring independence for the judiciary from the other branches. The Supreme Court has considered the same passage as Judge McBryde invokes and so interpreted it: "In our constitutional system, impeachment was designed to be the *only* check on the Judicial branch *by the Legislature*." *Nixon v. United States,* 506 U.S. 224, 235 (1993) (some emphasis added).

Indeed, the Hamiltonian concern for protecting the judiciary from other branches argues *for* internal disciplinary powers. Arrogance and bullying by individual judges expose the judicial branch to the citizens' justifiable contempt. The judiciary can only gain from being able to limit the occasions for such contempt. See *In re Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit,* 783 F.2d 1488, 1507-08 (11th Cir. 1986).

Judge McBryde invokes another element of constitutional history – the framers' consideration and rejection of the proposal to vest the impeachment power in the courts, or in some combination of judicial and legislative officers. But, as was true of the effort to find a negative implication in the Constitution itself, this tells us only what we already knew: that the framers lodged the powers of removal and disqualification solely in Congress, in the form of impeachment.

Judge McBryde acknowledges, as he must, that in other contexts the impeachment power does not exclude all intra-branch discipline. In *Myers v. United States,* 272 U.S. 52 (1926), the Supreme Court found (in the strongest form – against a contrary decision by Congress) that the President had power to *remove* civil officers, excluding judges, even though Congress would have been able to remove some of the same officers only through impeachment. While that power is not

absolute, its limitation does not depend on the exclusive power of Congress to impeach. See *Morrison v. Olson,* 487 U.S. 654, 691 (1988).

Judge McBryde would have us write off the Court's endorsement of executive branch discipline as peculiar to and dependent on the executive's hierarchical structure. But the question is the implication from the Constitution's vesting of impeachment power in Congress. The Constitution makes no distinction between judges and other officers. It provides only that "all civil Officers of the United States, shall be removed from Office on Impeachment." U.S. Const. art. II, § 4.

In short, the claim of implied negation from the impeachment power works well for removal or disqualification. But it works not at all for the reprimand sanction, which bears no resemblance to removal or disqualification and is the only sanction in the case that remains unmoot.[5] Thus Judge McBryde's textual argument fails. Given the benefits to the judiciary from intra-branch efforts to control the self-indulgence of individual judges, we see no basis for inferring structural limits on Congress's enabling such efforts.

Judge McBryde's second facial claim is that the Constitution, even assuming it does not altogether bar intra-judicial sanctions (other than by appeal, mandamus, etc.), flatly bars any such sanction for "anything to do with anything that happened when the judge . . . was acting and deciding cases or in any phase of the decisional function." Oral Arg. Tr. at 17-18. His counsel was quite explicit that this would include a judge's nakedly racist disparagement of counsel, *id.* at 9, indeed, "anything that the judge does verbally or physically in the course of adjudication," *id.* at 8. Asked whether this would include punching counsel, Judge McBryde's counsel suggested that criminal proceedings at state law would supply an ample remedy. *Id.* at 9.

It may help put Judge McBryde's theory in perspective to look at one of the many episodes that led to the present sanctions. In 1992, Judge McBryde sanctioned a lawyer appearing before him

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[5] Obviously, we do not decide whether a long-term disqualification from cases could, by its practical effect, affect an unconstitutional "removal."

for failing to have her client attend a settlement conference in violation of Judge McBryde's standard pretrial order, which required all principals to attend the conferences. Counsel represented a corporation and its employee, defendants in a suit in which plaintiffs, a woman and her 10-year old daughter, had alleged sexual harassment. One of the allegations was that the individual defendant "had terrorized the 10-year old . . . by popping out his glass eye and putting it in his mouth in front of her." *Committee Report* at 19. The lawyer thought the presence of the individual defendant would be counter-productive to settlement efforts; the individual had no assets and had given her full authority to settle. See *id.* at 20.

After chastising the lawyer, Judge McBryde required that she attend a reading comprehension course and submit an affidavit swearing to her compliance. See *id.* at 20. The attorney submitted an affidavit attesting to the fact that she found a course and attended for three hours a week for five weeks. Judge McBryde challenged her veracity and required that she submit a supplemental affidavit "listing 'each day that she was in personal attendance at a reading comprehension course in compliance with [the] court's order; the place where she was in attendance on each date; the course title of each course; how long she was in attendance on each day; and the name of a person who can verify her attendance for each day listed.'" *Id.* at 22. She complied. The Special Committee characterized this incident as reflecting a "gross abuse of power and a complete lack of empathy." *Id.* at 18. Judge McBryde tells us that the defendants unconstitutionally impugn judicial independence when they express a formal, institutional condemnation of this sort.

We assume arguendo that the procedures of the Act may not constitutionally be used as a substitute for appeal. But Judge McBryde's theory plainly goes well beyond judicial acts realistically susceptible of correction through the avenues of appeal, mandamus, etc. Appeal is a most improbable avenue of redress for someone like the hapless counsel bludgeoned into taking reading comprehension courses and into filing demeaning affidavits, all completely marginal to the case on which she was working. Possibly she could have secured review by

defying his orders, risking contempt and prison. But we are all at a loss to see why those should be the only remedies, why the Constitution, in the name of "judicial independence," can be seen as condemning the judiciary to silence in the face of such conduct. Counsel punched out by the judge could not even pursue a remedy by risking contempt, of course, since the punch involves no judicial order that he could disobey.

> The Court said in *Chandler,* in dictum to be sure:
>
> There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business.

398 U.S. at 84. As we noted above, we see nothing in the Constitution requiring us to view the individual Article III judge as an absolute monarch, restrained only by the risk of appeal, mandamus and like writs, the criminal law, or impeachment itself. We thus reject Judge McBryde's facial constitutional claims.

* * * * * *

The process of construing § 372(c)(10) led us to raise and answer the question whether the Review Committee was authorized to entertain Judge McBryde's constitutional as applied challenges, and we concluded that it was. The Committee, as we noted, has given a contrary answer. As we read § 372(c)(10) to deny us the authority to review any aspect of the decisions about Judge McBryde other than the facial constitutional claims, we have no authority to mandate the Committee's consideration of the as applied claims. We believe, nonetheless, that the Review Committee should reconsider its view in light of our opinion and we therefore request it to do so.

* * * * * *

Accordingly, the judgment of the district court as to the one-year and three- year suspensions is *vacated* and the judgment as to the reprimand is *affirmed*.

*So ordered.*

TATEL, *Circuit Judge*, concurring in part and dissenting in part:

I agree with the court in many respects: that Judge McBryde's challenge to the reprimand is not moot; that the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 is not facially unconstitutional; and that the Act bars us from reviewing Judge McBryde's statutory claims. I do not agree, however, that the Act precludes us from reviewing Judge McBryde's as-applied constitutional claims. I would therefore have reached those claims and, because I think one claim has merit, reversed the district court and directed that the matter be remanded to the Fifth Circuit Judicial Council for further proceedings. Although the Council's Report finds that Judge McBryde engaged in some clearly egregious and sanctionable conduct, the Report also describes judicial conduct that was either less clearly abusive or apparently quite appropriate, and the Report never adequately explains how – or even in some instances whether – such behavior rises to the level of a clear abuse of judicial power. The Report thus leaves open the possibility that Judge McBryde was sanctioned in part for behavior that was not at all abusive. In addition, because the Report is imprecise and leaves much conduct unexplained, using the Report as a basis for sanctions risks chilling other district judges' ability to manage their courtrooms effectively. I thus believe that the Council's actions amounted to an unconstitutional infringement of judicial independence.

I

This case has its origins in a prior dispute between Judge McBryde and his colleagues over certain case assignments. In late April and early May of 1995, Chief Judge Buchmeyer of the Northern District of Texas reassigned two cases, *United States v. Satz,* No. 4:94-CR-094-R (N.D. Tex.) and *Torres v. Trinity Industries, Inc.*, No. CA4-90-812-A (N.D. Tex.), from Judge McBryde to himself. The reassignments responded to Judge McBryde's allegedly "unwarranted" and "abusive" treatment of attorneys and court personnel. *See In re John H. McBryde,* 117 F.3d 208, 215-18 (5th Cir. 1997). In *Satz,* Judge McBryde had found an Assistant United States Attorney in contempt of court for, among other things, stating that a sealing order in a related federal case prevented her from answering certain of Judge McBryde's questions. Judge McBryde believed, erroneously as it turned out, that no such order existed. *Id.* at 213. *Torres* involved correspondence between Judge McBryde and the clerk of the court over an administrative error that had resulted in a court-approved settlement not being implemented. Judge McBryde wrote that a letter from the clerk had been "so unprofessional and so disrespectful . . . that it borders on, if it does not constitute, contempt of court." *Id.* at 215.

After Chief Judge Buchmeyer reassigned the two cases, Judge McBryde filed a Request for Assistance with the Fifth Circuit Judicial Council. *Id.* at 217. Fifth Circuit Chief Judge Politz referred the matter to a Special Investigatory Committee composed of himself, two fellow circuit judges, and two district judges. *Id.* Following several days of hearings, the Special Committee, relying on section 332 of the Act, upheld the reassignment, finding that "Judge McBryde's conduct in both cases was unwarranted." *Id.* Judge McBryde's attack on the AUSA and a second government official involved in *Satz* "and his accusations against them of lying and contempt of court," the Committee concluded, "were baseless, threatening irreparable damage to [their] professional reputations and careers." *Id.* His attack on the clerk of the court was likewise "unwarranted [and] abusive, and threatened to damage [her] professional reputation." *Id.*

Almost two years later, the Fifth Circuit vacated the reassignment order. According to the court, the Council had no author-

ity "to censure a judge under [section] 332" of the Act or to "order a case reassigned based on its disagreement with the district judge's factual findings." *McBryde,* 117 F.3d at 229. In reaching its conclusion, the court noted that "finders of fact could reasonably defend either side" of the dispute, stating explicitly that Judge McBryde "could piece together a number of facts that pointed to the larger conclusion that [the AUSA involved in the *Satz* case] was lying," that the Judge "delivered a cogent statement of his reasons for rejecting [the AUSA's] reliance on a broad sealing order," that "[w]e need not attribute paranoia or irrationality to Judge McBryde to explain his view that [the AUSA's] contentions about the sealing order were untruthful," and that "Judge McBryde's understanding of the factual basis for suspecting that [the court clerk in *Torres*] was on the verge of contempt was similarly within the bounds of reason." *Id.* at 218-19.

Meanwhile, shortly after Judge McBryde had requested the Judicial Council's assistance and long before the Fifth Circuit vacated the Special Committee's reassignment decision, Chief Judge Politz referred two complaints of misconduct against Judge McBryde (one of which involved the Judge's conduct in *Satz*) to the Special Committee, with directions to investigate and report on them. *Report of the Special Committee of the Fifth Circuit Judicial Council Regarding Complaints Against, and the Investigation into the Conduct of, Judge John H. McBryde* at 1 (Dec. 4, 1997). According to the Committee's eventual Report, Committee members were from the outset "concerned about two things: first, that Judge McBryde [might] have a health problem (physical or mental) which affect[ed] his activities as a judge, and second, that Judge McBryde ha[d] engaged in a pattern of abusive behavior as a federal judge." *Id.* at 3.

Pursuing its suspicions that Judge McBryde might suffer from a psychiatric disorder, the Committee submitted certain materials concerning Judge McBryde to two psychiatrists, asking the doctors whether a psychiatric examination of the Judge was warranted. Report at 3. When both doctors answered yes, the Council engaged in a series of ultimately unsuccessful efforts to get Judge McBryde to undergo such an examination. *Id.* In the

meantime, the Special Committee learned about "more and more instances of allegations of repetitive, abusive and excessive conduct by Judge McBryde beyond the allegations in the . . . complaints." *Id.* at 8. Therefore, invoking section 372(c)(5) of the statute, the Special Committee "decided to broaden its investigation" to encompass incidents from throughout Judge McBryde's judicial career. *Id.* In August, September, and October of 1997, the Committee held nine days of evidentiary hearings in New Orleans and Fort Worth. *Id.* at 9. Fifty-five witnesses testified, including federal district court judges, a state court judge, government and private attorneys who had practiced before or had contact with Judge McBryde, court personnel, former jurors who had served in Judge McBryde's courtroom, and current and former members of the Judge's staff. *Id.* at 9-10.

Based on this evidence, the Committee prepared a Report, the bulk of which set forth details concerning twenty-two separate incidents involving Judge McBryde's dealings with lawyers, fellow judges, a state judge, and the clerk of the court. Report at 10-107. Although these include some obviously abusive and serious incidents, *see, e.g.,* Maj. Op. at 67-68, the Report also includes several incidents that appear to be relatively trivial examples of a judge controlling a trial or of friction among judicial colleagues. For example, the Report describes an incident in which Judge McBryde, responding to defense counsel's claim that a prosecutor should have disclosed certain financial schedules, accused the prosecutor of adopting "a sort of cat-and-mouse approach to discovery." Report at 50. The judge neither dwelled on the matter nor imposed sanctions. *Id.* In another incident (that occurred in a parking lot), Judge McBryde became angry and lashed out at a fellow judge who had joked about the Judge's impatience. *Id.* at 101-03. On still another occasion (at a judges' meeting), Judge McBryde called two fellow judges "despicable." *Id.* at 103-04. Similar incidents appear throughout the Report: Judge McBryde was "not always solicitous of his fellow judges' needs or feelings" with respect to use of courtrooms, *id.* at 106; on learning that the lead public defender on a case was engaged in another courtroom, Judge McBryde attempted to proceed with the case "[r]ather

than calling another matter on the docket," *id.* at 24; in a private, one-on-one meeting with the Federal Public Defender, Judge McBryde stated that he was "concerned" about the relationship between public defenders and U.S. Attorneys, indicating that he "suspected" that defenders and U.S. Attorneys were engaged in a "'collusive effort' to subvert the Sentencing Guidelines," *id.* at 42.

The Report describes other conduct that, though apparently more abusive, might nonetheless be entirely appropriate under certain circumstances. For example, the Report recounts several instances in which Judge McBryde accused attorneys of bad faith, sometimes sanctioning them and sometimes not. *See, e.g.*, Report at 10-15, 15-18, 36-42. The Report also mentions two occasions on which Judge McBryde criticized an entire office. *See id.* at 17-18 ("I have perceived on more than one occasion recently that members of the Federal Public Defender's Office are less than candid with the court."); *id.* at 38 ("I just have the feeling that the Civil Section of the U.S. Attorney's office here in Fort Worth is not always candid with the Court. . . .").

The Report also examines Judge McBryde's trial rules and enforcement techniques. According to the Report, the Judge uses strict trial rules, including "the requirement that parties enter into . . . stipulation[s] with respect to . . . every uncontested fact in [a] case," which are then "read seriatim to the jury at the beginning of the case and may not be referred to again later in the proceeding," and a "prohibition on asking questions on cross-examination similar to questions asked of [witnesses] on direct examination." Report at 107-08. Quoting from transcripts in two cases, the Report states that "Judge McBryde's manner of enforcing his rules is harsh and often humiliating." *Id.* at 110. The Report describes the testimony of several witnesses who stated that the combination of Judge McBryde's rules and his manner of enforcing them creates an "oppressive and intimidating atmosphere that pervades Judge McBryde's courtroom," *id.* at 116, and has a "chilling effect" on these lawyers' ability to present their cases effectively, *id.* at 121. This kind of enforcement, the Report says, formed a "pattern" that had not changed despite appellate criticism. *Id.* at 122. Because of the chilling effect of Judge McBryde's rules and his

manner of enforcement, the Report concludes that attorneys, fearing humiliation or embarrassment, forego actions they believe are in their clients' best interests and fail to preserve issues for appeal. These problems, the Report notes, are difficult to correct through the appellate process. *Id.* at 121-22.

The Report acknowledges that some of Judge McBryde's former staff testified that he was "cordial and considerate in his dealings with them," and that several lawyers who testified on the Judge's behalf stated that he "prepares thoroughly, addresses motions promptly, . . . writes scholarly opinions on difficult legal questions," and moves cases through his docket expeditiously. Report at 123-24. Although acknowledging that these witnesses were comfortable practicing in front of Judge McBryde and thought that he was fair, *id.* at 113-15, the Committee concluded that just because "it is possible for some attorneys . . . to adapt to Judge McBryde's rules is not a vindication of these rules. The weight of evidence presented during the hearings convinces the Committee that Judge McBryde imposes unduly stringent rules on advocates and enforces these rules in an often harsh manner." *Id.* at 115-16.

Based on all of this evidence, the Report concludes (1) that "many of these individual instances, together with the patterns demonstrated over the years surveyed," indicate that Judge McBryde had "engaged in conduct prejudicial to the effective administration of the business of the courts," and (2) that Judge McBryde's "pattern of abusive behavior . . . has brought disrepute upon the federal judiciary." Report at 150. The Report recommends that the Council ask Judge McBryde to resign, and if he refused, that it impose the three sanctions – a reprimand and two suspensions – described in the court's opinion. Maj. Op. at 54-55. The recommended reprimand states that Judge McBryde's "intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others ha[d] detrimentally affected the effective administration of justice . . . in the Northern District of Texas," and that Judge McBryde had "abused judicial power, imposed unwarranted sanctions on lawyers, and repeatedly and unjustifiably attacked individual lawyers and groups of lawyers and court personnel," thus having a "negative and chilling impact on the Fort Worth legal

community," among other things "preventing lawyers and parties from conducting judicial proceedings in a manner consistent with the norms and aspirations of our system" and "harm[ing] the reputation of the court." Report at 154.

Invoking section 372(c)(6) of the Act, the Council imposed the three recommended sanctions. Six of the nineteen Council members voted against imposing the one-year suspension; two voted against the public reprimand; one voted against the three-year recusal. Order of the Judicial Council of the Fifth Circuit at 1, *In re John H. McBryde* (Jan. 7, 1998) (No. 95-05-372-0023).

Pursuant to the Act, Judge McBryde petitioned the Review Committee of the Judicial Conference for review of the Council's order. Granting "substantial deference" to the Judicial Council's findings of fact, Memorandum and Order of the Judicial Conference of the United States at 6, *In re Complaints of Judicial Misconduct or Disability* (Sept. 18, 1998) (No. 98-372-001), and expressly declining to review any of Judge McBryde's constitutional claims, *id.* at 21, the Review Committee rejected the Judge's remaining procedural and substantive complaints. Finding the one-year suspension justified as a remedial, rather than a punitive, measure, the Review Committee revised the Council's sanction in one respect: it ordered the suspension terminated if Judge McBryde demonstrates that he had "seized the opportunity for self-appraisal and deep reflection in good faith and . . . made substantial progress toward improving his conduct." *Id.* at 27.

## II

My main disagreement with the court centers on section 372(c)(10)'s last sentence – the Act's review preclusion clause. Unlike my colleagues, I do not believe that this clause prevents us from reaching Judge McBryde's as-applied constitutional claims.

As the court points out, under both Supreme Court and D.C. Circuit precedent, we construe review preclusion clauses to prevent review of constitutional claims only when we find "clear and convincing" evidence of congressional intent to do

so. Maj. Op. at 59. Even outside the constitutional context, a "general presumption favor[s] judicial review in the absence of 'clear and convincing evidence of a contrary legislative intent.'" *Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 490 (D.C. Cir. 1988) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)). "The maxim that congressional preclusion of judicial review must be 'clear and convincing' applies in a particularly rigorous fashion . . . when constitutional claims are at stake." *Id.* at 494. As we said in *Ungar v. Smith*, "[w]hen . . . [a] plaintiff seeks to invoke the aid of the judicial branch on constitutional grounds, the Supreme Court and this court have both indicated that only the clearest evocation of congressional intent to proscribe judicial review of constitutional claims will suffice to overcome the presumption that the Congress would not wish to court the constitutional dangers inherent in denying a forum in which to argue that government action has injured interests that are protected by the Constitution." 667 F.2d 188, 193 (D.C. Cir. 1981). *See also Webster v. Doe*, 486 U.S. 592, 603 (1988) ("We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.") (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

In my view, the requisite "clear and convincing" evidence of intent is absent here. As my colleagues acknowledge, section 372(c)(10) contains no language expressly barring constitutional challenges. *See* Maj. Op. at 59-60. Indeed, Congress knows how to preclude review of constitutional claims when it wants to. For example, the federal statute governing deportation and denaturalization provides that "[j]udicial review of all questions of law and fact, *including interpretation and application of constitutional and statutory provisions*, . . . shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9) (emphasis added).

In *Ungar* as well as in *Ralpho v. Bell*, we found statutes containing language just as preclusive as section 372(c)(10)'s insufficient to bar review of as-applied constitutional claims. The statute in *Ungar* provided that administrative decisions are "final" and "not . . . subject to review by any court." 667 F.2d

at 193 (internal quotation marks omitted). In *Ralpho,* the statute provided that "[administrative decisions] shall be final and conclusive for all purposes, notwithstanding any other provision of law to the contrary[,] and not subject to review." 569 F.2d 607, 613 (1977). Using equally preclusive language, section 372(c)(10) provides that "[a]ll orders and determinations [of the Judicial Conference] . . . shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." 28 U.S.C. § 372(c)(10).

As my colleagues also note, *see* Maj. Op. at 59-60, absent express statutory language, our prior opinions have "studied the legislative history" in search of a "clear expression of Congress's desire to prevent the courts from passing upon . . . constitutional claims," *Ungar,* 667 F.2d at 196, or an "affirmative statement addressed to preclusion of *constitutional* claims." *Griffith,* 842 F.2d at 494. Here, as in *Ralpho, Ungar,* and *Griffith,* the legislative history includes no direct comment at all about whether the Act's review preclusion language was meant to cover constitutional challenges. *See* Maj. Op. at 59-60 ("Of course if the [*Griffith*] trilogy is read to require magic words expressly barring as applied constitutional attacks, they are not to be found.").

Lacking a clear affirmative statement in the statute's text or legislative history, my colleagues infer from the defunct Senate version of the Act and its accompanying legislative history that Congress intended the preclusion clause to cover as-applied constitutional challenges. *See* Maj. Op. at 59-63. Although this is certainly a plausible interpretation of the legislative history, both *Griffith* and *Ungar* declined to treat such inferences from prior versions of bills as sufficiently clear evidence of congressional intent to preclude judicial review of as-applied claims. In *Griffith,* the original Senate bill provided that most decisions of the Federal Labor Relations Authority would be "final and conclusive" and not subject to further judicial review, but provided an exception for "questions arising under the Constitution." 842 F.2d at 495. The conference committee, rejecting the House's proposal for expansive judicial review and generally adopting the Senate's more restrictive approach, dropped "without explanation" the exception for constitutional questions.

*Id.* Nevertheless, observing that circuit precedent required an "affirmative statement addressed to preclusion of *constitutional* claims," *id.* at 494, we held that "[t]his silent deletion [was] not enough, under our cases, to support an inference of intent to precludeconstitutional claims." *Id.*

The statute at issue in *Ungar* provided that Justice Department decisions regarding claims for the return of assets vested in the Office of Alien Property were not subject to judicial review. Deciding that this provision did not preclude review of as-applied constitutional claims, we noted that "[a]n earlier version of the bill . . . included an elaborate scheme for trial of just-compensation claims in the Court of Claims," which was "deleted on the House floor for reasons that are not wholly plain." We were nonetheless "not willing to regard this as clear evidence of Congressional intent. . . ." 667 F.2d at 195 n.2.

The evidence of legislative intent to preclude judicial review that we declined to credit in *Griffith* and *Ungar* was, if anything, stronger than in this case. In those cases, we found legislative history insufficiently clear and convincing to preclude as-applied challenges even though the original versions of the statutes at issue allowed review of constitutional questions, while the final versions eliminated such provisions, suggesting a movement *toward* precluding such review. Here, by contrast, the legislative history suggests movement *away* from preclusion. Senator DeConcini, one of the Act's primary sponsors, introduced a Report prepared by Johnny H. Killian, an American law specialist at the Library of Congress, suggesting that under Supreme Court precedent, Congress can safely preclude judicial review of constitutional claims so long as "litigants at some point [have] access to an Article III court." 125 CONG. REC. 30,050 (1979) (statement of Sen. DeConcini). Senator DeConcini's bill provided for review of disciplinary decisions by a newly created, five-judge Article III Court of Judicial Conduct and Disability. *Id.* Later House revisions shifted review from the five-judge court to the Judicial Conference. In doing so, the House Judiciary Committee emphasized that it was moving from a "court" to an "administrative model." *Compare* H.R. REP. No. 96-1313, at 4 (1980) ("[R]ather than creat[ing] luxurious mechanisms such as special courts and commissions

– with all the trappings of the adversary process, including legal counsel, written transcripts, discovery and cross examination – the [House version of the bill] emphasize[s] placing primary administrative responsibility within the judicial branch of government.") *with id.* at 14 (stating that this "legislation creates much more of an 'inquisitorial-administrative' model than an 'accusatorial-adversary' one"). When the Act returned to the Senate, Senator DeConcini made the same point, explaining to his colleagues that the Judicial Conference, unlike the five-judge court proposed in the Senate version of the bill, was "not an independent review court." 126 CONG. REC. 28,090 (1980) (statement of Sen. DeConcini, quoting the Killian Report); *see also Chandler v. Judicial Council of the Tenth Circuit,* 398 U.S. 74, 86 n.7 ("[T]he Judicial Council was intended to be . . . an administrative body functioning in a very limited area in a narrow sense as a 'board of directors' for the circuit."). Because Congress had been informed by the Killian Report that it could safely preclude review of constitutional questions only if such review was available in an Article III court, and because it had also been advised by both Senator DeConcini and the House Judiciary Committee that the Judicial Conference was not an Article III court, Congress would have understood that vesting power to review disciplinary decisions in the Judicial Conference opened those decisions to constitutional attack in the federal courts.

Under all of these circumstances, I do not see how the evidence of Congress's intent to preclude as-applied constitutional challenges can be considered clear and convincing – or, as we required of legislative history in *Griffith,* "unusually clear." 842 F.2d at 494. Not only did both *Griffith* and *Ungar* find similar inferences from legislative history insufficient to meet the clear and convincing standard, but in this case, there is an equally plausible – if not more plausible – interpretation of the legislative history that suggests Congress did *not* intend to preclude review of as-applied constitutional challenges.

My colleagues' observation about "substantial redundancy" between review performed by the Judicial Conference and Article III courts, *see* Maj. Op. at 62-63, is interesting, but I think not dispositive. For one thing, while it is true that the two

forms of review are both performed by Article III judges, I do not agree that they are entirely redundant: decisions of Article III courts are reviewable on certiorari by the Supreme Court, a distinction of particular importance given the constitutional interests at stake here. Even assuming they were identical, moreover, such functional redundancy would be convincing evidence of Congressional intent only if it were the sole form of evidence available, and it isn't. In view of Senator DeConcini's statement and the House Judiciary Committee Report, Congress most likely thought shifting review from an Article III court to the Judicial Conference opened decisions of the latter to as-applied constitutional challenges in the federal courts. In my view, this primary evidence of legislative intent outweighs any inferences that might be drawn from whatever functional redundancy may exist.

Finally, my colleagues believe that preclusion of constitutional claims would serve the statutory purpose of "prevent[ing] undue prolongation of the disciplinary process." Maj. Op. at 62-63. But we have twice found review preclusion statutes designed to accomplish similar goals insufficient to establish clear congressional intent to bar review of as applied constitutional claims. *See Griffith*, 842 F.2d at 495 (Congress's scheme to limit judicial review of FLRA decisions was meant to promote "finality, speed[,] and economy," and thus barred district court review of FLRA decisions on statutory grounds, but review of as-applied constitutional claims nonetheless was not precluded); *Ungar*, 667 F.2d at 195-96 (legislative history indicating that review preclusion provision was "intended to reduce . . . delay in adjudicating claims under the Trading with the Enemy Act" was not a "clear expression of Congress's desire to prevent the courts from passing upon . . . constitutional claims").

## III

Having found no "clear and convincing" evidence that Congress intended to preclude review of as-applied constitutional challenges to judicial council sanctions, I would have considered the merits of Judge McBryde's as-applied claims.

In addition to the challenges discussed by the court, *see* Maj. Op. at 64-68, Judge McBryde raises the question whether the Judicial Council unconstitutionally interfered with his judicial independence by punishing him because it disagrees with his judicial philosophy and acts: "Purportedly pursuant to the Act, defendants investigated Judge McBryde's performance of his judicial functions, requiring him to defend his performance and disrupting his judicial activities. They then punished him, and changed his judicial status, because they disapproved of his judicial performance, depriving him of all new cases for one year . . . and issuing a damning public reprimand. Does the Act violate the judicial independence doctrine of Article III on its face and as applied?" Appellant's Opening Br. at 2. Answering this question, Judge McBryde argues that "the Constitution does not allow agencies to supervise his judging, disagree with his rulings, and punish him because his rulings do not meet some 'norm' of acceptable judicial conduct." *Id.* at 52-53. The Judicial Conference disagrees: "Given the conduct engaged in and the adverse effects on the judicial system in Fort Worth, Texas, that conduct had, Appellees submit that it was not unconstitutional to suspend assignment of new cases for up to one year for [the Judge] to reflect and to change his conduct." Appellees' Br. at 68-69.

I agree with my colleagues that the principle of judicial independence does not "constitutionally shelter[ ]" Judge McBryde from "sanctions of every sort." Maj. Op. at 65. I also agree that the creation of a mechanism enabling Judicial Councils to sanction judges for things that happened when they were "acting and deciding cases" or engaged in some other "phase of the decisional function" does not render the Act facially unconstitutional. *Cf. Chandler*, 398 U.S. at 85 ("Many courts – including federal courts – have informal, unpublished rules. . . . These are reasonable, proper, and necessary rules, and the need for enforcement cannot reasonably be doubted. [I]f one judge in any system refuses to abide by such reasonable procedures, it can hardly be that the extraordinary machinery of impeachment is the only recourse."). For reasons I will explain, however, I do believe that the principle of judicial independence permits sanctions to be imposed only for conduct that is *clearly*

abusive or *clearly* prejudicial to the adversarial process, and in this case, I think that Judge McBryde's conduct, as described in the Council's Report, does not uniformly meet this standard.

As an initial matter, I believe the principle of judicial independence guarantees to individual Article III judges a degree of protection against interference with their exercise of judicial power, including interference by fellow judges. As my colleagues note, the Supreme Court expressly stated in *Northern Pipeline* that the constitutional guarantee of life tenure "insulates the individual judge from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 59 n.10 (1982). Similarly, in *Chandler*, a case involving intrajudicial discipline, the Supreme Court stated that "[t]here can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." 398 U.S. at 84. *See also In re Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488, 1506-07 (11th Cir. 1986) (noting, in the context of adjudicating the facial constitutionality of certain provisions of the Act, that "the majority [in *Chandler*] located a judge's protected independence . . . 'in deciding cases or in any phase of the decisional function,'" and then framing its basic inquiry as "whether [the] direct or indirect effects . . . the Act may have on an individual judge's independence are within proper tolerances").

The notion that individual judges enjoy a sphere of protected independence finds support in the cases establishing that judges cannot be held liable for damages arising out of performance of their judicial duties. "[I]t is a general principle of the highest importance to the proper administration of justice," the Supreme Court stated in *Bradley v. Fisher,* "that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would

destroy that independence without which no judiciary can be either respectable or useful." 80 U.S. (13 Wall.) 335, 347 (1871). Similarly, in *Pierson v. Ray*, the Court stated that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction.... This immunity applies even when the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." 386 U.S. 547, 553-54 (1967). *Cf. Quercia v. United States*, 289 U.S. 466, 469 (1933) ("Under the Federal Constitution the essential prerogatives of the trial judge as they were secured by the rules of the common law are maintained in the federal courts.").

Of particular relevance to this case, I believe the sphere of individual judicial independence – the protected "decisional function," as *Chandler* puts it, 398 U.S. at 84 – includes not only judges' freedom to reach their own conclusions about questions of fact and law, but also a margin of discretion to manage and control the adversarial process within their courtrooms. "Courts of justice," the Supreme Court has explained, "are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates. These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (internal citations and quotations omitted). And as we have recognized, the exercise of this power requires that "a district judge ha[ve] wide discretion in monitoring the flow of a criminal trial. It is well within her discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior. . . . There is a 'modicum of quick temper that must be allowed even judges.'"

*United States v. Donato*, 99 F.3d 426, 434 (D.C. Cir. 1997) (quoting *Offutt v. United States*, 348 U.S. 11, 17 (1954)).

A judge's authority to control the courtroom is essential to the exercise of judicial power. Unlike legislative and executive power, the judicial power created by Article III can be exercised only on the basis of a factual record developed pursuant to established standards of relevance and authenticity. *See* FED. R. EVID. 402 (requiring that evidence be relevant to be admissible), 901 (requiring that evidence be authentic to be admissible). Critical to the development of a proper record is a well-functioning adversarial process in which lawyers serve both as zealous representatives of their clients and as officers of the court with responsibilities for fairness and disclosure that transcend their clients' interests. Unless judges can manage this process, if necessary by using both formal and informal disciplinary measures to ensure that lawyers perform their dual functions effectively and in accordance with established rules of practice and procedure, they may lack the fully developed record needed to exercise their judicial authority.

Judges' power to control the adversarial process, of course, is not absolute. Inappropriate trial management, for example, can undermine a trial's fairness. *See, e.g., Offutt*, 348 U.S. at 17 (explaining that trial judge's becoming personally embroiled with defense counsel compromised the court's "atmosphere of austerity" that is "consonant with a fair trial"); *Donato*, 99 F.3d at 430-31 (finding that judge's failure to provide counsel with bench conference outside the jury's presence violated Federal Rule of Criminal Procedure 30 and constituted prejudicial error); *Santa Maria v. Metro-North Commuter RR*, 81 F.3d 265, 273 (2d Cir. 1996) (finding that a trial judge's expressed antipathy toward and removal of trial counsel sufficiently prejudiced a defendant so as to require a new trial). A judge's abusive treatment of attorneys can prevent them from effectively defending their clients' interests. *See In re McConnell*, 370 U.S. 230, 236 (1962) ("While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom . . . it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases."). Abusive

treatment of lawyers can undermine the judiciary's reputation, threatening its integrity in the eyes of the public. *Cf. In re Certain Complaints,* 783 F.2d at 1507 ("The judiciary as a whole . . . has a interest in seeing that non-frivolous complaints are looked into, to the end that the judge, and the system he exemplifies, be exonerated or, if not that the public perceive that the system has undertaken to police itself, within constitutional limits, of course."); S. REP. No. 96-362, at 7 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4321 ("The perception of a viable healthy judiciary is of critical importance to our system of justice."). As the Supreme Court has said, "an independent judiciary *and* a vigorous, independent bar are *both* indispensable parts of our system of justice." *McConnell,* 370 U.S. at 236 (emphasis added).

It is thus appropriate for Judicial Councils, acting pursuant to their general disciplinary power under section 372(c), to ensure that judges' trial management techniques do not interfere with the "effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c)(1). After all, Congress has authority to "limit[ ]" courts' inherent powers – including their power to manage trials – "by statute and rule, for these courts were created by act of Congress." *Chambers,* 501 U.S. at 47 (internal quotation marks omitted); *see, e.g., McConnell,* 370 U.S. at 233-34 (noting that Congress has limited courts' inherent powers to sanction attorney contempt by requiring such sanctions to be no more severe than necessary).

This does not mean that Congress may infringe – or authorize Judicial Councils to infringe – upon judges' trial management authority in any manner it sees fit. It is a familiar principle that even though Congress has the power to create lower federal courts and organize their functioning in certain respects, it can neither interfere with nor alter essential features of their operation. *See, e.g., Plaut v. Spendthrift Farm,* 514 U.S. 211, 240 (holding that Congress may not pass legislation that reopens final judgments of federal courts). Having vested authority to conduct trials in individual district judges, Congress cannot grant Judicial Councils the power to interfere with those judges' trial management authority to such an extent that judges cannot exercise it effectively. *Cf. In re Holloway,* 995 F.2d 1080, 1088

(D.C. Cir. 1993) (observing that absent a judge's ability to control a trial with enforceable sanctions, "trials would wander down every by-way, no matter how impermissible, in a sprawling chaos that would render the adjudication close to random. In the long run, such chaos is hardly in the interests of defendants as a whole, much less in the interest of society."). Congressional delegation of such authority would also violate the principle of separation of powers, which prevents not only the aggrandizement of one branch of government at the expense of another, but also the disruption by one branch of another's essential functions. *See Morrison v. Olson,* 487 U.S. 654, 675 (1988) (noting that "separation- of-powers concerns . . . would arise" if Congress's power to provide for interbranch appointments of inferior officers "had the potential to impair the constitutional functions assigned to one of the branches"); *Mistretta v. United States,* 488 U.S. 361, 404 (1989) (stating that the "ultimate inquiry" whether executive appointment of Article III judges to administrative posts violated separation of powers principles turned on whether the "particular extrajudicial assignment undermines the integrity of the Judicial Branch").

Thus, while I agree that in order to discourage the improper use of judicial power, protect the fairness of trials, and safeguard the integrity and reputation of the judiciary, it is appropriate to allow judicial councils to sanction judges for abusing their trial management power, I also believe that, to prevent such disciplinary action from encroaching upon legitimate and necessary uses of that power, such sanctions should be employed only for conduct that, viewed from the perspective of reasonable judges and lawyers, is *clearly* abusive toward counsel or *clearly* prejudicial to the adversarial process.

A rigorous standard of this kind is essential for several reasons. First, absent such a standard, judicial councils could more easily use their disciplinary authority to sanction non-abusive judicial behavior. Federal judges are not all alike: there are as many appropriate courtroom management techniques as there are judges. In any given situation, moreover, there will generally be more than one appropriate way to manage a trial or demand attorney compliance with court orders

and rules. One judge may use a light touch to get an aggressive lawyer to end an entirely inappropriate line of questioning; another judge may threaten sanctions. Allowing judges to punish each other absent evidence of clear abuse of counsel or clear damage to the adversarial process risks turning judicial discipline into a vehicle for sanctioning stylistic disagreements over trial techniques.

Second, some Judicial Council members, such as appellate judges, may have little or no experience dealing with aggressive trial lawyers who routinely test the limits of proper advocacy. To such judges, the trial management techniques needed to control these lawyers may seem harsh, even abusive. A rigorous standard that restricts sanctions to instances of clearly abusive behavior will reduce the likelihood that councils will sanction appropriate behavior out of inexperience. And quite apart from the problem of inexperience, even judges can act unfairly – indeed vindictively – towards colleagues. A rigorous standard will reduce, though of course it cannot eliminate, the possibility that judicial discipline will be used to sanction unpopular judges engaged in appropriate behavior.

Third, judicial discipline, like civil liability for judicial acts, can chill the proper exercise of judicial discretion. *See Pierson v. Ray,* 386 U.S. 547, 553-54 (1967) (holding that imposing civil liability for acts committed to judicial discretion "would contribute not to principled and fearless decisionmaking but to intimidation"); *cf. Williams v. United States,* 156 F.3d 86, 91-92 (1st Cir. 1998) ("If chastened attorneys can enlist appellate courts to act as some sort of civility police charged with enforcing an inherently undefinable standard of what constitutes appropriate judicial comment on attorney performance, trial judges are more likely to refrain from speaking and writing candidly. In our view, this chilling effect carries with it risks that are far greater than those associated with the evil of occasional overheated judicial commentary."). If judges can be sanctioned for conduct that is only arguably or possibly – as opposed to clearly – abusive, they may be reluctant to employ stern measures even when necessary to keep control of the adversarial process. This is especially true because a trial judge's harsh words or tough sanctions, entirely appropriate in

the heat of a tense and hard-fought trial, may seem abusive when viewed in retrospect through the pages of a cold record.

The possibility of chilling legitimate judicial behavior also means that, in cases like this one where judges are sanctioned in part for the effect their behavior has on lawyers who practice before them, judicial councils should apply an objective standard, asking not just what complaining lawyers felt, but also how the judge's conduct would have affected *reasonable* lawyers under similar circumstances. It is only natural for lawyers to feel slightly constrained and irritated when judges try to control them. If judicial councils fail to apply an objective standard when evaluating lawyer reactions and complaints, judges might fear discipline if enough disgruntled lawyers file complaints or testify against them. Judges might thus calibrate courtroom discipline to avoid displeasing lawyers, refraining from strict measures even when necessary and appropriate.

Finally, we have previously adopted a rigorous standard where, as here, sanctions could damage an individual's reputation. In *Shepherd v. ABC,* we held that courts cannot impose discovery sanctions based on attorney misconduct without clear and convincing evidence of the predicate wrongdoing. 62 F.3d 1469, 1476-78 (D.C. Cir. 1995); *see also Addington v. Texas,* 441 U.S. 418, 424 (1979) (stating that reputational interests "are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof"). If, because of the risk of imposing reputational harm, Article III courts must apply a heightened standard when sanctioning lawyers, a similar obligation should apply to judicial councils when considering disciplining fellow judges. Suspensions and, in particular, reprimands can cast long-lasting shadows over a judge's career.

I recognize that under a heightened standard, some abusive judicial conduct may be unsanctionable. Confining the disciplinary process to clear abuses of judicial power, however, would not eliminate all means of dealing with less abusive conduct. Judges address such conduct informally and collegially, and the President and Senate try to ensure that judicial nominees possess the appropriate temperament to serve as

life-tenured federal judges. Although such efforts may be imperfect, it seems far wiser to tolerate some inappropriate judicial conduct than to risk chilling appropriate judicial conduct throughout the federal judiciary.

With these principles in mind, I return to the facts of this case.

## IV

Several incidents described in the Council's Report, such as the episode my colleagues recount, *e.g.*, Maj. Op. at 67-68, are so extreme and clearly abusive that, as the Special Committee concludes in one instance, they speak for themselves. *See* Report at 23 ("No more need be said with regard to this incident."); *see also, e.g., id.* at 26-30 (describing Judge McBryde's sanctioning the entire Federal Public Defender's Office because a single attorney could not be reached for forty-five minutes due to a misunderstanding); *id.* at 51-55 (describing Judge McBryde's berating an Assistant United States Attorney and holding him in contempt of court because a secretary had trouble connecting all of the parties to a conference call); *id.* at 55-59 (describing Judge McBryde's jailing an Assistant Public Defender who refused to answer a question he believed might compromise attorney-client privilege); *id.* at 60-65 (describing Judge McBryde's removing a state court judge from Judge McBryde's chambers without inquiring why the state court judge was there). Had the Council restricted its report to incidents like these, I would have no trouble rejecting Judge McBryde's as- applied challenge, for no reasonable judge would think behavior like this appropriate.

Not all of the conduct described in the Report, however, falls so clearly outside the bounds of appropriate judicial behavior. The Report's main deficiency is that it never adequately explains how such apparently less abusive conduct – ranging from the "cat-and-mouse" comment to accusations of lawyer bad faith to Judge McBryde's trial practice rules – amounts to a clear abuse, or in some instances even an abuse at all, of judicial power. The Report itself acknowledges that at least one incident was "fairly trivial," but suggests that "along with other incidents" it was "illustrative of a pattern of conduct." *Id.* at 23.

I recognize that trivial conduct that would not be abusive if it happened once might become so if repeated consistently over time. I also understand that intra-judicial discipline may be an important means of addressing patterns of behavior that cannot be corrected through informal mechanisms or appellate review. *See id.* at 122; Carol Rieger, *The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?*, 37 EMORY L.J. 45, 78-80 (1988). That said, it is not at all clear to me that the more trivial incidents the Report describes, even if they occurred persistently, amounted to abuses of judicial power. For example, I think it not at all obvious that a judge who consistently employed phrases like "cat-and-mouse approach to discovery," had difficult relations with colleagues, or was "not always solicitous of his fellow judges' needs or feelings" in the use of courtrooms, would be guilty of abusing his judicial power. Although I understand the Committee's desire to include a sufficient number of incidents to establish patterns of conduct, because I think that judicial discipline must not interfere with judicial independence, the Committee should have restricted its Report to incidents that, if occurring repeatedly, would represent clear abuses of judicial power. As it stands, the Report leaves unclear whether the patterns formed by these more trivial incidents were at all abusive, let alone clearly abusive. If they were abusive, the Committee failed to explain why. The Report thus leaves open the possibility that Judge McBryde was sanctioned in part for legitimate judicial behavior. And absent an explanation of how such conduct constitutes a clear abuse of judicial power, imposing sanctions based on this record risks chilling legitimate conduct by other judges.

In the second category of incidents presented in the Report – those involving conduct that, although more clearly bordering on the abusive, might nonetheless be entirely appropriate under some circumstances, *see supra* at 71 – I think the Committee similarly failed to explain adequately what made Judge McBryde's conduct clearly abusive, and thus sanctionable. Consider, for example, the Report's description of instances in which Judge McBryde accused attorneys of bad faith. According to the Report, these incidents form a pattern that reveals Judge McBryde's "proclivity to question the integrity of

attorneys appearing before him." Report at 124. Yet the Committee fails to establish that these incidents, taken together, were clearly abusive. Much of the Report's discussion simply recounts that on several occasions Judge McBryde "exhibited distrust of attorneys' motives" and "often directly accus[ed] them of lying or conspiring to deceive him." *Id.* at 124-25. This in itself is unremarkable, since evaluating attorney good faith is one of a trial judge's functions.

The Report does suggest, however, that what sets these incidents apart is that Judge McBryde's suspicions were "unfounded," *id.* at 150, and that the Judge had "refus[ed] to take simple steps to verify whether or not his suspicion of bad faith on the part of others [was] justifiable." *Id.* at 126. I agree that a pattern of consistent, unfounded accusations of bad faith might well represent a clear, sanctionable abuse of judicial power. In explaining why these accusations were "unfounded" or otherwise problematic, however, the Committee gives little or no weight to how things would have looked to an objectively reasonable judge in Judge McBryde's position. In one case, for example, the Report states that "[w]e believe [that an attorney accused of bad faith] told the Special Committee the truth" when he testified that he had not lied to Judge McBryde, Report at 17 n.4; yet the Report never explicitly says whether Judge McBryde himself lacked any reasonable basis for believing the lawyer was deceiving him. Likewise, when describing the *Torres* incident, the Report criticizes Judge McBryde's treatment of the clerk of the court without considering whether the Judge had a reasonable basis for thinking the clerk's conduct verged on contempt. *See id.* at 72-78; *cf. In re McBryde,* 117 F.3d 208, 219 (5th Cir. 1997) ("Judge McBryde's understanding of the factual basis for suspecting that Clerk Doherty was on the verge of contempt was similarly within the bounds of reason."). How can conduct amount to a clear abuse of judicial power unless that conduct seemed abusive to an objectively reasonable judge? Put differently, it seems absurd to say that conduct is clearly abusive if a reasonable judge under the circumstances would have thought it appropriate.

The Report's discussion of the manner in which Judge McBryde enforces his trial rules is similarly flawed. I agree that

if a judge "imposes unduly stringent rules on advocates and enforces these rules in an often harsh manner," and if as a result those rules "so restrict cross-examination that they impede the effective administration of justice," that conduct should be sanctionable. Report at 116. Yet the Report's description of Judge McBryde's rules and their enforcement includes many phrases and characterizations that encompass perfectly legitimate trial practices: Judge McBryde's cases are "replete with [the Judge's] constant admonishments to counsel to move on to something else; not to allude to a stipulated fact; and orders to (or threats to order) lawyers to sit down during openings of the examination of witnesses," *id.* at 110; "Judge McBryde ultimately uses the threat of contempt and sarcasm to enforce his rules," *id.* at 111; "[t]he Committee heard numerous additional examples of Judge McBryde's interrupting a lawyer during the questioning of a witness or conduct of the trial to enforce one or more of his rules, sometimes in a harsh, threatening, or sarcastic manner," *id.* at 113. To be sure, the Report also states that the Committee was "fully cognizant of the notion that a trial judge should be afforded broad discretion to manage and conduct trials," and that Judge McBryde's "extreme and unduly restrictive rules" and manner of enforcement were "different not only in degree but also in kind from the wide array of acceptable trial management rules." *Id.* at 121-22. But simply stating this conclusion provides insufficient guidance about why in Judge McBryde's case "admonishments to counsel to move on," "the threat of contempt and sarcasm," or other routine conduct amounted to a clear abuse of judicial power. Because this section of the Report contains too much general language that could describe any judge's appropriate courtroom conduct, resting sanctions on these descriptions could chill the legitimate exercise of judicial power.

The Council failed in other ways to take sufficient account of the Report's chilling effect. In its discussions of Judge McBryde's accusations of attorney bad faith, for example, the Report never acknowledges that judges must often assess attorney good faith, or that it is not necessarily out of order for a judge to attempt to send a message to an entire office that has given him problems in the past. *See Bonds v. District of*

*Columbia*, 93 F.3d 801, 805 n.7 (D.C. Cir. 1996) ("If they [the District's counsel] don't show, you proceed without them. If the witnesses don't show, I'll hold them in contempt. That's the only way I can deal with the District of Columbia Government these days.") (quoting trial transcript). Nor does the Report sufficiently acknowledge that district judges need a reasonable margin of error in making findings of bad faith, especially when presiding over tense trials calling for quick decisions to control the behavior of aggressive lawyers. Nor, finally, does the Report recognize that assessments of attorney bad faith are not necessarily abusive even if later set aside on appeal. *See* Report at 14-15 ("The Fifth Circuit . . . noted that there was no evidence of bad faith on the [accused party's] part."). To avoid chilling appropriate judicial conduct, I think the Committee should have explained more thoroughly and more explicitly how Judge McBryde's behavior differed from permissible exercises of judicial power.

The Council's insensitivity to the potentially chilling effect of its Report is likewise apparent in its discussion of the impact Judge McBryde's behavior had on others. Describing the effect of Judge McBryde's enforcement of his trial rules upon the adversarial process, as well as the impact of the Judge's abusive treatment of attorneys upon the Fort Worth legal community as a whole, the Committee often seems to credit the views of witnesses who testified before it without ever determining whether those views represented what reasonable lawyers would have felt in similar circumstances. The Report explains, for example, that the prosecutor Judge McBryde accused of using a "cat-and-mouse approach to discovery" left legal practice in part as a result of that incident, quoting at length the attorney's explanation of why the threat of Judge McBryde's treatment led him to leave his job. *See* Report at 51. Similarly, the Report cites the testimony of numerous lawyers who stated that they felt oppressed, harassed, afraid to ask questions, and generally unable to function effectively in Judge McBryde's courtroom. *See id.* at 116-21, 132-37.

I agree that a judge whose harsh management of trials makes it impossible for lawyers to practice in front of him creates a serious problem. I also understand that proving that a judge had

such an effect requires testimony from lawyers who practice before the judge. But in examining the testimony of such lawyers, the Committee should have attempted to discern not simply whether Judge McBryde had a disruptive effect on the Fort Worth legal community, but also whether his conduct would clearly prejudice the ability of reasonably resilient and thick-skinned lawyers to present their cases effectively.

In sum, I have no doubt that several of Judge McBryde's actions were clearly sanctionable: they were flagrant abuses of judicial power. In its understandable desire to be thorough, however, the Committee included in its Report many actions and incidents which either seem to be entirely appropriate or involve conduct that might have been appropriate under some circumstances. I understand that even actions which are not obviously and flagrantly abusive on their face can be abusive either in context or as part of a pattern. Because of the fundamental importance of judicial independence and the risk that sanctions could punish or chill legitimate judicial behavior, however, I think that sanctioning such conduct requires judicial councils to explain precisely how and why it rises to the level of a clear abuse of judicial power. Here, the Committee's Report falls far short of this standard. I would therefore have remanded the case to the Council with instructions to limit its Report to evidence that, when viewed objectively, demonstrates a pattern of conduct that amounts to a *clear* abuse of judicial power, or a pattern of conduct *clearly* prejudicial to the adversarial process, and then in light of this sharpened record, to re-evaluate the appropriateness of the sanctions and to impose those sanctions deemed necessary to deter future misconduct by Judge McBryde and other judges and to preserve the reputation and integrity of the federal judiciary.

## V

Because my colleagues recognize that Judge McBryde's challenge to the reprimand is not moot, the substance of the foregoing analysis is largely unaffected by their view that his challenge to the suspensions *is* moot. But because under my colleagues' theory of mootness, a judge suspended for only a

few years but not reprimanded would never be able to challenge the suspension, I respectfully register my disagreement with this aspect of the court's opinion. In my view, Judge McBryde's challenge to his suspensions is not moot for two independent reasons. First, the suspensions – which remain published on the Fifth Circuit's web site, *see* http://www.ca5.uscourts.gov /mcbryde/council.htm (last visited Sept. 6, 2001) – give rise to ongoing stigmatic and reputational injury at least as serious as that of the reprimand. Second, Judge McBryde raises an issue that seems "capable of repetition yet evading review." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Although this court's opinion puts Judge McBryde on notice that his peers can constitutionally sanction him for some inappropriate in-court conduct, *see* Maj. Op. at 68, the opinion leaves unclear precisely what kind of conduct would trigger sanctions. The court never decides whether it was constitutional for the Judicial Council to have sanctioned Judge McBryde for the conduct described in the Report, and I do not think informing Judge McBryde in the abstract that he must give his colleagues at least a "modicum of civility and respect," *id.*, provides much guidance about what kind of conduct is constitutionally sanctionable. Thus, even assuming that Judge McBryde accepts the court's conclusion that his peers can punish him for *some* in-court conduct, he will not know whether it is constitutional for his peers to sanction him for behavior like that described in the Report. *See* Report at 59 (stating that Judge McBryde believed his incarceration of a lawyer for refusal to answer a question was "appropriate under the circumstances"); *id.* 63-64 (quoting transcript of Committee hearing suggesting that Judge McBryde thought it was appropriate under the circumstances to have a state court judge removed from his chambers without asking the state judge why he had come to see Judge McBryde). Given this uncertainty, and given Judge McBryde's aggressive judicial style, there is ample reason to suspect that his behavior might again provoke sanctions.

## APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF COLUMBIA

No. 98-2457 (CKK)

HON. JOHN H. MCBRYDE,
Plaintiff,
v.
COMMITTEE TO REVIEW CIRCUIT
COUNCIL CONDUCT AND DISABILITY
ORDERS OF THE JUDICIAL
CONFERENCE OF THE UNITED STATES,
HON. WILLIAM J. BAUER, THE
JUDICIAL COUNCIL OF THE FIFTH
JUDICIAL CIRCUIT, HON. HENRY A. POLITZ,
Defendants,
and
THE UNITED STATES OF AMERICA,
Intervenor-Defendant.

Decided December 30, 1999.

MEMORANDUM OPINION

KOLLAR-KOTELLY, District Judge.

This case arises out of an investigation by a Special Committee ("Special Committee") of the Judicial Council of the Fifth Judicial Circuit ("Judicial Council") into the conduct of the Honorable John H. McBryde, United States District Judge for the Northern District of Texas, pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c). The Special Committee's investigation spanned two years, culminating in a 159-page Report containing findings of fact and recommendations to the Judicial Council. On December 31, 1997, upon consideration of the Special Committee's Report and various responses thereto, the Judicial Council publicly reprimanded

Judge McBryde for "conduct prejudicial to the effective administration of the business of the courts." As a remedial measure, the Judicial Council ordered that no new cases be assigned to Judge McBryde for a period of one year, and disqualified Judge McBryde from participating in any cases involving certain attorneys for a period of three years. Although the disqualification order took effect immediately, the assignment order was stayed while Judge McBryde sought review from the Judicial Conference of the United States. On September 18, 1998, the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States ("Review Committee") substantially affirmed the Judicial Council's Order. Upon this affirmance, the assignment order took effect immediately, subject to the Review Committee's proviso that it could be lifted if the Judicial Council found that "Judge McBryde's conduct indicates that he has seized the opportunity for self- appraisal and deep reflection in good faith and that he has made substantial progress toward improving his conduct."

In an eight-count complaint filed on October 15, 1998, Judge McBryde challenges the constitutionality of the Act, both facially and as applied to him, on the grounds that the Act violates the separation of powers doctrine (Counts I, II and III), fails to afford due process (Count VI), and violates the First Amendment (Count VIII). In addition, Judge McBryde claims that the proceedings violated the Act and the Fifth Circuit Complaint Rules (Counts IV, V and VII). Judge McBryde names as defendants the Judicial Council of the Fifth Judicial Circuit and its Chairman, the Honorable Henry A. Politz; and the Committee to Review Circuit Conduct and Disability Orders of the Judicial Conference of the United States ("Judicial Conference") and its Chairman, the Honorable William J. Bauer ("Defendants"). This court granted permission for the United States to intervene as a defendant for the limited purpose of defending the constitutionality of the Act.

Before the Court are cross-motions for summary judgment and/or to dismiss filed by Judge McBryde, the Defendants, and the United States. For the reasons elaborated below, the Court finds that the Act is constitutional, both on its face and as it has

been applied to Judge McBryde, except insofar as its confidentiality clause impermissibly inhibits Judge McBryde's ability to speak openly about the proceedings. In particular, the Court finds that the Act does not usurp or encroach upon the power of impeachment that properly resides with the Legislative Branch. Nor does the Act jeopardize the independence of the judiciary, an invaluable facet of our democracy that stands to be enhanced by judicial self-monitoring. Moreover, because the Act authorizes review not of the merits of a judge's legal decisions, but of a judge's alarming or destructive pattern of conduct, it poses no threat to a federal judge's Article III function.

In response to Defendants' contention that the Act's finality clause bars review of Judge McBryde's claims, the Court determines that it retains jurisdiction to consider these claims to the extent they allege facial violations of the statute or violations of Judge McBryde's constitutional rights, whether facial or as-applied. Thus authorized to conduct such a review, the Court concludes that no facial violations of the statute took place, with respect either to the scope of the investigation or to the nature of the material which the Special Committee and the Judicial Council addressed. After evaluating carefully Judge McBryde's assertion that Defendants impermissibly reviewed the merits of his judicial decisions, the Court finds that they confined their investigation to a pattern of behavior toward attorneys and others, which they found demonstrates intemperance and abusiveness. Further, the Court concludes that the sanctions levied against Judge McBryde did not transgress into the forbidden realm of impeachment, but rather were limited in scope and tailored to the problem that his behavior posed. The Court finds against Judge McBryde on his due process claims, since Defendants provided him with the fundamental requirements of due process, including notice and an opportunity to be heard.

The Court is, however, persuaded by Judge McBryde's contention that the Act's confidentiality clause, as it has been applied to him, operates as an impermissible prior restraint on his speech. Now that the proceedings have concluded and the sanctions against him have been imposed, Judge McBryde must enjoy the opportunity to speak openly and freely about those

proceedings, absent some sufficiently compelling interest to justify curtailment of this opportunity. Defendants have demonstrated no interest of that magnitude here.

## I. BACKGROUND[1]

The Judicial Council's investigation and subsequent discipline of Judge McBryde represents the most significant application of the Judicial Conduct and Disability Act, 28 U.S.C. § 372, since its enactment in 1980. Congress designed the Act to provide a mechanism whereby the Judicial Branch can systematically investigate and resolve allegations of judicial misconduct or disability. *See* S.Rep. No. 96-362, at 1, *reprinted in* 1980 U.S.C.C.A.N. 4315, 4315. In an effort to address "the growing public demand for the accountability of public officials," *id.* at 5, members of Congress and the Judicial Branch worked together to draft legislation that would provide an alternative means of remedying conduct that is prejudicial to the administration of justice, and yet does not rise to the level of an impeachable offense, criminal infraction, or reversible error. *See* H. Rep. No. 101- 512, at 10, *reprinted in* 1990 U.S.C.C.A.N. 6879, 6884 (detailing the involvement of the judiciary in drafting the Act). The conduct targeted by the Act ranges from such intangibles as a lack of "judicial temperament" to patterns of abusive behavior that threaten to undermine the integrity of the judiciary as a whole, as well as behavior symptomatic of an underlying disability. While recognizing that cases of judicial misconduct were infrequent, Congress found that these "[r]are instances of judicial misconduct that have gone unchecked prompt the establishment of a procedure within the judiciary for the processing of complaints aimed at a federal judge." S.Rep. No. 96-362, at 5. The ultimate question before the Court is whether these procedures violate the Constitution, both on their face and as they were applied to Judge McBryde.

### A. The Statutory Scheme

In this section, the Court shall present a brief overview of those statutory provisions at issue in this litigation. Section 372(c)(1) permits any person alleging that a district judge "has engaged in conduct prejudicial to the effective and expeditious

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[1] An *Index* can be found at the end of this Memorandum Opinion.

administration of the business of the courts" to file a written complaint with the chief judge of the circuit. 28 U.S.C. § 372(c)(1). In the alternative, § 372(c)(1) allows the chief judge to "identify" a complaint on the basis of information available to him or her. *Id.* Upon expeditious review of a complaint, the chief judge has three options: he may dismiss the complaint, *see id.* § 372(c)(3)(A); conclude the proceeding, *see id.* § 372(c)(3)(B); or initiate an investigation by appointing a special committee, *see id.* § 372(c)(4)(A).

If the chief judge decides to appoint a special committee to investigate the charge, the committee "shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit." *Id.* § 372(c)(5). After the special committee files its report, the Act empowers the judicial council to respond in a number of ways. If it appears necessary, the judicial council may conduct an additional investigation pursuant to § 372(c)(6)(A). Alternatively, the judicial council may dismiss the complaint pursuant to § 372(c)(6)(C). If the judicial council decides to act on the special committee's report, the Act directs that the judicial council

> shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:
>
> ...
>
> (iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;
>
> ...
>
> (vi) censuring or reprimanding such judge or magistrate by means of public announcement; or
>
> (vii) ordering such other action as it considers appropriate under the circumstances.

*Id.* § 372(c)(6)(B). Although a complainant or judge aggrieved by the judicial council's action may petition the Judicial Conference of the United States for review, in all other respects, any orders and determinations "shall be final and conclusive and

shall not be judicially reviewable on appeal or otherwise." *Id.* § 372(c)(10).

*Judge McBryde has also challenged the Act's confidentiality* clause, *id.* § 372(c)(14), which renders confidential "all papers, documents, and records of proceedings related to investigations conducted under this subsection." These materials "shall not be disclosed by any person in any proceeding," unless "such disclosure is authorized in writing by the judge ... who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee ...." *Id.* § 372(c)(14)(C). The confidentiality clause features certain other exceptions, but § 372(c)(14)(C) is the only one that is at issue here.

**B. The Special Committee's Investigation and Report**

Judge McBryde's difficulties with his colleagues on the Fifth Circuit date back to the spring of 1995, when Chief Judge Jerry Buchmeyer of the Northern District of Texas transferred two cases from Judge McBryde's docket to his own. *See* In re *McBryde,* 117 F.3d 208 (5th Cir.1997) ("*McBryde I*") (providing a detailed description of the events leading up to the transfers). In May 1995, Chief Judge Politz convened a meeting with Judge McBryde and Chief Judge Buchmeyer in an attempt to resolve informally this dispute over the matters involving the two cases, *United States v. Satz,* and *Torres v. Trinity Industry Inc. See* Pl.'s 108(h) ¶ 14. At the meeting, Judge McBryde informed his colleagues that he intended to seek the Judicial Council's assistance in returning these cases to his docket. *Id.* ¶ 15. In response, Chief Judge Politz "told Judge McBryde that if he sought the assistance of the Judicial Council in resolving the legal issue at the heart of this dispute, his entire career as a judge would be explored." *Id.* ¶ 16. Notwithstanding this remark, Judge McBryde filed a request for assistance in June 1995, pursuant to 28 U.S.C. § 332. *Id.* ¶ 19.

In July 1995, an attorney filed a complaint describing Judge McBryde's "obstructive, abusive, and hostile conduct" during trial.[2] *Id.* ¶ 20. While the controversy over *Satz* and *Torres*

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[2]In an effort to comply with the confidentiality clause, the Court shall refrain from naming any of the witnesses who testified before the

continued to develop, Chief Judge Politz "identified" other complaints about Judge McBryde. *See* 28 U.S.C. § 372(c)(1) (authorizing the Chief Judge to identify complaints). On September 13, 1995, Chief Judge Politz appointed a Special Committee pursuant to 28 U.S.C. § 372(c) to investigate the allegations of misconduct that had been levied against Judge McBryde. Pl.'s 108(h) ¶ 24(u). This same committee was also charged with the task of investigating Judge McBryde's request for assistance with *Satz* and *Torres*. *Id.* ¶ 27. The Special Committee held a hearing on Judge McBryde's request for assistance on October 19, 1995.[3] *Id.* ¶ 29. Although the Judicial Council denied Judge McBryde's request for assistance, *id.* ¶ 44, the United States Court of Appeals for the Fifth Circuit ultimately granted Judge McBryde's petition for a writ of mandamus and vacated Chief Judge Buchmeyer's reassignment orders. *See McBryde I,* 117 F.3d at 231.[4]

During the nineteen months between the denial of Judge McBryde's request for assistance and the Fifth Circuit's decision in *McBryde I,* the Special Committee continued to spar with Judge McBryde. The members of the Special Committee were "concerned about two things: first, that Judge McBryde may have a health problem (mental or physical) which affects his activities as a judge, and second, that Judge McBryde has engaged in a pattern of abusive behavior as a federal judge." Report at 3. These concerns led the Special Committee to seek the advice of two psychiatrists, without Judge McBryde's knowledge or consent. Pl.'s 108(h) ¶¶ 51-54. On the recommendation of the two psychiatrists, the Special

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Special Committee.

[3]Judge McBryde has raised numerous objections to this § 332 hearing, none of which is properly before the Court in this challenge to the constitutionality of § 372(c).

[4]Two of the complaints against Judge McBryde pertained to the *Satz* and *Torres* matters. After the Fifth Circuit vacated Chief Judge Buchmeyer's order, the Special Committee "determined not to hear evidence in [the § 372(c) ] proceeding concerning the sufficiency of the record that was before Judge McBryde in *Satz* and *Torres*." Report at 8.

Committee asked Judge McBryde to submit to a psychiatric evaluation. *Id.* ¶ 55. Judge McBryde refused. On July 31, 1996, the Special Committee obtained an order from the Judicial Council requiring Judge McBryde to undergo a full psychiatric examination. *Id.* ¶ 73. After Judge McBryde initiated a lawsuit challenging the order, the Judicial Council sought a contempt finding against Judge McBryde for violating the order. *Id.* ¶¶ 76-79. Concerned that the 372(c) investigation was becoming mired in controversy over the psychiatric examination, the Special Committee obtained a stay of these proceedings. *Id.* ¶ 81.[5]

Two other significant developments occurred during this period. Reacting to the mounting allegations of "repetitive, abusive, and excessive conduct by Judge McBryde beyond the allegations in the five complaints," Chief Judge Politz decided to expand the scope of the investigation pursuant to § 372(c)(5), and Judge McBryde engaged in a series of legal skirmishes with the Judicial Council and the Fifth Circuit over the appropriate forum for subpoenas *ad testificandum* and *duces tecum. See* Report at 8; *see generally In re McBryde,* 120 F.3d 519 ("*McBryde II* ").

On August 25, 1997, the Special Committee's evidentiary hearings finally commenced. Report at 9. The Special Committee Report summarized these proceedings as follows:

> The Special Committee conducted evidentiary hearings in New Orleans on August 25 through August 29, 1997 and in Forth Worth on September 29 through October 2, 1997. During the nine days of hearings, the Special Committee received in evidence hundreds of exhibits, mostly court records and transcripts in matters before Judge McBryde.

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[5]In lieu of prevailing upon Judge McBryde to undergo a full psychiatric examination, the Special Committee ultimately retained a psychiatrist who attended the evidentiary hearings, listened to witness testimony, and observed Judge McBryde's demeanor. At the conclusion of the hearing, the psychiatrist submitted a report summarizing his observations and offering his clinical impressions, without actually advancing a diagnosis. The Special Committee appended the psychiatrist's correspondence as an attachment to its Report. *See id.* ¶¶ 81, 131; Report, Attachment A.

> Among the witnesses presented by Special Counsel were four federal District Court Judges; one Texas State Court Judge; a former U.S. Attorney for the Northern District of Texas; the Director of Enforcement of the Securities and Exchange Commission; the head of the Public Defender's Office in Fort Worth; Assistant U.S. Attorneys and Federal Public Defenders; the Clerk of the District Court for the Northern District of Texas; and private attorneys who practiced before Judge McBryde. Judge McBryde's witnesses included private and public attorneys who practiced before him; court personnel; employees of the General Services Administration ("GSA"); former members of juries which decided cases over which he presided; and present and former members of his staff.

Report at 9-10. After digesting evidence about numerous discrete incidents and events spanning Judge McBryde's tenure as a federal judge, the Special Committee concluded that "[w]hen viewed in isolation, the incidents described above run the gamut from outrageous to inappropriate. When viewed together, the incidents bespeak several alarming patterns of conduct exhibited by Judge McBryde over the course of his tenure on the bench." *Id.* at 124. These patterns fall into five categories: "Proclivity to Question Integrity," *id.* at 124-27, "Overreactions and Abusive Sanctions," *id.* at 127-28, "Obsessive Need to Control," *id.* at 128, "Inappropriate Conduct Toward Fellow Judges," *id.* at 130-31, and "Effect on the Legal Community," *id.* at 132-37. On December 4, 1997, the Special Committee published its findings in an extensive and detailed Report. Without repeating every detail of the Special Committee's extensive findings, which comprise over 100 pages of the Report, the Court will briefly recount some of the representative events of Judge McBryde's behavior.[6]

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[6]The Special Committee organized its Report around twenty discrete scenarios exemplifying Judge McBryde's intemperate and abusive behavior, one of which encompasses several incidents. *See* Report, Table of Contents. In addition, the Report related in more summary terms other examples evidencing Judge McBryde's conduct, and its impact on the legal community.

The Special Committee found that Judge McBryde tends to "overreact to perceived transgressions of his rules and expectations or intrusions on his authority." *Id.* at 127-28. In one incident, Judge McBryde held an attorney in contempt of court when, due to a malfunctioning of the telephone system, the attorney's office was unable to initiate a prompt conference call with the Court and opposing counsel. *Id.* at 52-55. Although Judge McBryde acknowledged that, "on the surface," holding the attorney in contempt was unfair, he maintained that trial lawyers have to have a "tough skin." *Id.* at 55. He further justified his severe reprimand by adding that "[t]hings like that have been said to me by judges over the years. It didn't hurt my feelings. That's part of our business." *Id.* Terrified of Judge McBryde after this incident, and fearful about testifying before the Committee, the attorney accepted a temporary transfer to another district following his appearance as a witness in the Special Committee hearings. *Id.*

On another occasion, a criminal defense attorney declined to answer a question which Judge McBryde posed because he believed erroneously that his response would waive his client's privilege and redound to his client's detriment. Judge McBryde refused to recess the proceeding to allow the attorney an opportunity to consult with his client or to research the issue before responding to Judge McBryde. Instead, Judge McBryde ordered in open court that the attorney be incarcerated until he agreed to answer the question, holding the attorney in civil contempt of court for not responding to his question. *See id.* at 57-59. The Special Committee did not focus on whether or not the claimed attorney-client privilege was valid--and the Court of Appeals later found that it was not--but on Judge McBryde's treatment of the attorney. For instance, in reference to Judge McBryde's unwillingness to recess the proceedings to allow the attorney to research an issue which had arisen unexpectedly, the Committee wrote: "There was no exigency warranting this treatment of [the attorney], other than the self-defined exigency of Judge McBryde to complete the proceeding once it had begun." *Id.* at 59.

In a different case, an attorney received a call from chambers at 4:50 p.m. to inform him that, in response to his

motion to continue a sentencing, the court had scheduled a hearing for 9:00 a.m. the following morning, and would require the physician to testify live at the hearing as to his client's medical condition necessitating continuance of the sentencing. The attorney was able only to arrange for the physician to participate in a telephone conference call before the physician left town. Judge McBryde first ordered the attorney ejected from the courtroom, and later, upon permitting him to reenter, questioned the attorney in a belittling fashion about his knowledge of the use of subpoenas. *See id.* at 89-91.

These and other such examples describe incidents in which counsel appearing before Judge McBryde attempted to explain, on the record, why they had been unable to comply with the Court's orders. Judge McBryde, however, refused to listen to the attorneys' explanations, cut them off, and dealt with them in a humiliating and sarcastic manner. Without commenting on the merits of the lawyers' explanations, the Special Committee found that the sanctions Judge McBryde meted out were disproportionate to the perceived infractions, and that "this tendency to overreact and to impose disproportionate sanctions makes conducting trials or other proceedings before Judge McBryde extremely stressful on some lawyers." *Id.* at 127-28. As all attorneys and judges are aware, collateral consequences involving the state bar association attach when a judge finds an attorney in contempt of court. Moreover, federal prosecutors in particular bear an obligation to report to the Office of Professional Responsibility of the Department of Justice when a federal judge accuses them of dishonesty. *See id.* at 82 n. 33.

The Special Committee also found that Judge McBryde exhibited a tendency to accuse attorneys of mendacity without taking even the most rudimentary "steps to verify whether or not his suspicion of bad faith on the part of others is justifiable." *Id.* at 126.[7] In one such incident, he accused government counsel of

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[7]Elsewhere the Special Committee described "a disturbing pattern on Judge McBryde's part of making devastating allegations of deceit and bad faith against attorneys who disagree with him." *Id.* at 35.

negotiating in bad faith in violation of a local rule during a settlement discussion, and threatened sanctions against the attorney solely on the basis that counsel would not agree to a provision in the settlement agreement that the enforcement order be sealed from public view. *Id.* at 12. On the record, Judge McBryde berated counsel and disparaged his position that the need for public disclosure was a principle of law enforcement critical to the government agency. *Id.* at 12-14. When the attorney steadfastly adhered to the principle of full disclosure, Judge McBryde reacted in such an angry and accusatory manner that government counsel met with his colleagues to discuss his fear that he might be held in contempt and incarcerated. *Id.* at 14. Again, the Special Committee focused on Judge McBryde's treatment of this and other attorneys rather than on whether or not Judge McBryde was correct on the merits of his determination that the order should be sealed.[8]

In a similar incident, Judge McBryde again concluded that government counsel were not acting in good faith in settlement proceedings when they failed to make a monetary settlement offer to a plaintiff. *Id.* at 38. He issued a show cause order as to why they should not be held in contempt and conducted a lengthy hearing to inquire into the attorneys' reasoning for not making such an offer, the transcript of which the Special Committee found to include "dozens of pages of invective" by Judge McBryde. *Id.* at 37-39. Characterizing the government's motion for summary judgment in this case as "an affront to the Court," Judge McBryde "issued a broad attack on the integrity of the entire [office]," suggesting that its attorneys were " 'not always candid with the Court.' " *Id.* at 38. Without regard to the accuracy of Judge McBryde's allegations, the Special

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[8]On appeal, the Fifth Circuit held that the district court had abused its discretion in sealing the final order and transcript, reversing and remanding the case to Judge McBryde. *See S.E.C. v. Van Waeyenberghe,* 990 F.2d 845, 847 (5th Cir.1993). The court also found that the counsel opposing the sealing order was not in fact acting in bad faith. *See id.* at 849 n. 5. The Court of Appeals did not, however, comment on Judge McBryde's behavior toward the attorney, but instead merely asserted that Judge McBryde's accusation of bad faith was incorrect.

Committee found that "the sarcastic and abusive language used by Judge McBryde is itself a cause of concern. There was simply no good reason to belittle and attack [the attorneys] in such a repetitive and relentless manner." *Id.* at 39.[9]

On another occasion, Judge McBryde ordered on the record in open court that an attorney attend fifteen hours of a remedial reading course--and submit an affidavit attesting to her compliance with this mandate--because of her failure to adhere to Judge McBryde's standing order that each party appear in person at settlement conferences. *Id.* at 21-22. After imposing this humiliating sanction, he rejected her initial affidavit of compliance, questioning her integrity, and required that she submit a new one which set out in detail the dates, times, and places of attendance. *Id.* at 22. A separate incident involved one trial attorney's failure to remain in continuous contact with the court during jury deliberations. When Judge McBryde's chambers informed the attorney that the deliberating jury had recessed for lunch, the attorney left the courthouse. *Id.* at 26-27. Chambers had advised the attorney in error, though, as the jury had decided to forgo lunch and to continue to deliberate, reaching a verdict while the attorney remained unavailable for 45 minutes. *Id.* at 27. As a result, Judge McBryde ordered that the delinquent attorney *and every attorney in his office* wait, without exception, on the fourth floor of the courthouse throughout jury deliberations in any case before him, including

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[9]The sanctions which Judge McBryde imposed upon the government attorneys in this case also reached the Fifth Circuit on appeal. *See Dawson v. United States,* 68 F.3d 886 (5th Cir.1995). Ultimately, the court of appeals vacated the order imposing sanctions, and reversed the findings of bad faith against government counsel. *See id.* at 898-99. In a footnote regarding the government's summary judgment motion and the Texas statute upon which the government relied, but had failed to raise at an earlier stage in the proceedings (*i.e.,* as an affirmative defense), the *Dawson* court declined to address the district court's conduct directly. Instead, the court of appeals included a suggestive remark responding to portions of Judge McBryde's order quoted earlier in the opinion: "Equally, whether this failure, or counsels' raising the Texas statute by other means, merited the court's scathing rebuke, as quoted *infra,* is another matter upon which we will not comment." *Id.* at 891 n. 5.

through any lunch break or recess of the deliberations. This order remained in effect for sixteen months. *Id.* at 27-30. It was lifted only when an attorney from that office had to try a case before Judge McBryde on another floor while simultaneously required to wait on the fourth floor in compliance with Judge McBryde's order. *Id.* at 28-29. The Special Committee found that these incidents and others reflect "an abusive tendency," a "lack of judicial temperament," *id.* at 127, and an "obsessive need to control" other persons and proceedings, *id.* at 129.

Additionally, the Special Committee listened to testimony suggesting that attorneys who otherwise would have asked certain questions or marshaled certain arguments in order to make their record felt so intimidated by Judge McBryde, and so fearful that he would undermine them openly before a jury, that they stifled their better litigation judgment. For example, one attorney testified that, when trying a case before Judge McBryde, he and others in his office generally declined to pose questions during jury voir dire out of fear that Judge McBryde would humiliate them in front of prospective jurors. *Id.* at 120. Others offered similar examples of the extent to which Judge McBryde's harsh, ridiculing, and seemingly arbitrary treatment of lawyers appearing before him exercised a chilling effect on those attorneys' zealous representation of their clients. *See, e.g., id.* at 111-13, 115-16. The Special Committee found this behavior on Judge McBryde's part to be particularly troubling, suggesting that "the cumulative effect of his trial procedures impedes the ability of lawyers to try their cases." *Id.* at 122 (citing *Sims v. ANR Freight System, Inc.*, 77 F.3d 846, 850 (5th Cir.1996)). One government counsel testified that his entire office anticipated appearances before Judge McBryde with great trepidation, and that the office had to stay on constant guard lest the attorneys make litigation decisions--such as settlement offers--out of fear rather than considered legal judgment. *Id.* at 133-34. As a general matter, the Special Committee emphasized the breadth of "Judge McBryde's negative effect on the Fort Worth legal community ...." *Id.* at 135. Notwithstanding its severity and manifestly negative repercussions, the Special Committee underscored the fact that Judge McBryde's intemperate and abusive behavior eluded redress except through

the kind of disciplinary channel contemplated by the Act. In the words of the Special Committee,

> [t]he very nature of the effect of Judge McBryde's pattern of conduct-- the failure of lawyers to act; the decision to forgo asking questions or moving for relief; the sleepless nights; the refusal to accept cases; the decision to seek employment elsewhere; the compromising of advocacy as a form of self-protection--cannot be remedied through the appellate process and often cannot even be articulated in isolation. Nevertheless, the harm to the administration of justice is palpable and must be redressed.

*Id.* at 137.

Finally, the Special Committee heard testimony recounting interactions between Judge McBryde and other members of the Judiciary, both Federal and State, in which Judge McBryde behaved in a disrespectful and offensive manner. For instance, an attorney was involved in a jury trial before a state judge at the same time that Judge McBryde had scheduled the attorney to appear at a pretrial conference. *See id.* at 60. Concerned about the prospective overlap, counsel filed a request for a continuance on the day before the pretrial conference. Judge McBryde denied the request. *Id.* Surprised because jury trials usually take precedence over other matters, counsel alerted the state court judge to the conflict. The state court judge suggested that he and counsel arrive early in court to place a joint call to Judge McBryde in order to assure him that the attorney was in fact in trial. *Id.* Finding Judge McBryde not yet in his chambers, the two left a message to this effect; the state court judge specifically requested that Judge McBryde telephone him to discuss the conflict, since he was willing to leave the bench to accept Judge McBryde's call. *Id.* at 61.

Having received no word from Judge McBryde shortly before the pretrial conference was scheduled to commence, the state court judge excused the attorney and recessed the trial, leaving the jury waiting for counsel's return. *Id.* At that point, the state court judge determined to see Judge McBryde privately in order to explain the situation. Along with his court reporter who drove him to federal court, leaving behind her reporting equipment, the state court judge traveled to Judge McBryde's

chambers where he was directed to wait in a conference room along with two lawyers who were participating in the pretrial matter. *Id.* Shortly thereafter, one of Judge McBryde's law clerks entered the conference room, obviously embarrassed, to deliver a message to the state court judge from Judge McBryde that "Judge McBryde told me to tell you that you are not welcome here and you are to leave." Stunned, the state court judge departed after requesting that Judge McBryde release the trial counsel as soon as possible, since a jury awaited his return to resume the trial. *Id.* at 62. By way of explanation for this conduct, Judge McBryde asserted that he assumed the state court judge had come to engage in a confrontation.[10] *Id.* at 63-64. As evidenced by this incident, Judge McBryde was quick to impute improper motives and bad faith not only to attorneys appearing before him, but also to his peers, whom he treated in a like manner. *See id.* at 64.

In its Report, the Special Committee ultimately recommended that Judge McBryde be given a choice: to retire voluntarily, *id.* at 151-52, or to face sanctions, including a public reprimand, *id.* at 152, suspension of all new case assignments to Judge McBryde for one year, *id.* at 152-54, and disqualification of Judge McBryde for a period of three years in any case involving a lawyer whom the Special Committee had identified as a potential witness at the hearing, *id.* at 154-58.

**C. Action by the Judicial Council and the Review Committee**

On December 17, 1997, the Judicial Council for the Fifth Circuit held a hearing to consider the Special Committee's Report and Judge McBryde's response thereto. *See* Pl.'s 108(h) Stmt. ¶ 134. Two weeks later, on December 31, the Judicial

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[10]Judge McBryde testified before the Special Committee as follows: "I didn't know whether he was there for the purpose of creating a confrontation of some kind. I simply did not know what he was there for. I was told he was there with a court reporter. I assumed that it was to engage in some kind of inappropriate activity on his part ...." *Id.* at 64. His peers on the District Court fared no better with Judge McBryde. The Special Committee listened to several incidents in which Judge McBryde reacted with rancor and insult to his fellow district court judges. *See* id. at 103-07.

Council published its order and public reprimand, adopting the Special Committee's Report, findings of fact, and recommendations "[t]o the extent relevant to the action" that the Council pursued. *See* Order and Public Reprimand. Rather than attempt to summarize the Order and Public Reprimand, the Court shall take advantage of its brevity to reproduce it in full:

> WHEREAS a Special Investigating Committee of the Council (the "Special Committee"), pursuant to 28 U.S.C. § 372(c)(5) and Rule 9(A) of the Fifth Circuit's Rules Governing Complaints of Judicial Misconduct or Disability, conducted an investigation, held hearings over nine days during which over fifty witnesses testified, and received evidence regarding complaints against, and the conduct of, Judge John H. McBryde of the United States District Court for the Northern District of Texas;
>
> WHEREAS, pursuant to 28 U.S.C. § 372(c)(5), the Special Committee issued a report to the Council dated December 4, 19997; and
>
> WHEREAS the Council has considered the record, the Special Committee's Report, the Responses thereto, and statements by counsel and Judge McBryde at the Council's December 17, 1997 meeting.
>
> To the extent relevant to the action taken below, the Council adopts by a clear majority vote the Special Committee's Report, Findings of Fact, and Recommendations. Based thereon:
>
> 1. The Council hereby PUBLICLY REPRIMANDS Judge McBryde, pursuant to 28 U.S.C. § 372(c)(6)(B)(vi), for conduct prejudicial to the effective and expeditious administration of the business of the courts within the Circuit and inconsistent with Canon 2(A) and Canon 3(A)(3) of the Code of Conduct for United States Judges.
>
> Judge McBryde has engaged in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and discord within, the federal judiciary. This conduct is unacceptable and damaging to the federal judiciary.
>
> Judge McBryde's intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others has

detrimentally affected the effective administration of justice and the business of the courts in the Northern District of Texas. Judge McBryde has abused judicial power, imposed unwarranted sanctions on lawyers, and repeatedly and unjustifiably attacked individual lawyers and groups of lawyers and court personnel. This pattern of behavior has had a negative and chilling impact on the Forth Worth legal community and has, among other things, prevented lawyers and parties from conducting judicial proceedings in a manner consistent with the norms and aspirations of our system and is harmful to the reputation of the courts.

2. Pursuant to 28 U.S.C. § 372(c)(6)(B)(iv), no new cases are to be assigned to Judge McBryde for a period of one (1) year from the effective date of this Order; and

3. Pursuant to 28 U.S.C. § 372(c)(6)(B)(vii), Judge McBryde, for a period of three (3) years from the effective date of this Order, is not to participate in (i) cases now pending before him (other than any as to which there are appellate proceedings) in which any of the attorneys listed on Attachment A are currently involved, and (ii) any and all cases filed after the effective date of this order in which the initial notice of appearance includes any of the attorneys listed on Attachment A.

4. Consistent with 28 U.S.C. § 332(d)(2), the Council directs all judicial officers and employees within the Circuit, particularly the Chief Judge of the Northern District of Texas and the Clerk of the Court for the Northern District of Texas, to take all necessary steps to carry into effect the above orders of the Council.

5. The Council hereby directs that implementation of this Order and Public Reprimand shall be stayed for 30 days after entry so that Judge McBryde may seek to appeal to, and obtain an additional stay from, the Judicial Conference of the United States. This Order shall also remain sealed during the period of any stay thereof.

This order is issued on the date recited below but shall not become effective until all stays have expired or been lifted.

New Orleans, Louisiana, this 31st day of December 1997.

In this Order, the Judicial Council disciplined Judge McBryde with three sanctions: (1) a public reprimand; (2) suspension of all new case assignments for one year; and (3) suspension from participation of cases involving twenty- three attorneys who had testified against him at the hearings. Although the Judicial Council stayed implementation of its order for 30 days pending any appeal by Judge McBryde, Judge McBryde filed an application for a further stay to permit him additional time to petition the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders ("Review Committee") for review. Pl.'s 108(h) ¶¶ 169-172. The Review Committee agreed to stay the Order and Public Reprimand, with the exception of paragraph 3, until March 16, 1998, by which time Judge McBryde was required to file his intended petition for review.

On March 16, 1998 Judge McBryde filed seven petitions for review of the judicial council's actions. *See* 28 U.S.C. § 372(c)(10) (authorizing a complainant, judge, or magistrate aggrieved by an action of the judicial council, taken in response to the report of a special investigating committee, to petition the Judicial Conference of the United States for review). After evaluating Judge McBryde's petitions and all of the responsive briefs, the Review Committee issued a Memorandum and Order on September 18, 1998 in which it substantially affirmed the Judicial Council's Order.[11] *See* Review Committee Order at 27.

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[11]In its Order, the Review Committee recounted the history of the Section 372 proceedings involving Judge McBryde, and then proceeded to determine what standard of review it should apply to the Judicial Council's findings of fact (*i.e.*, those the Council adopted from the Special Committee's Report) and judgment with respect to the appropriate sanctions under these circumstances. Review Committee Order at 2-4. After a detailed discussion of the matter, the Review Committee deemed that it should apply an intermediate standard of "substantial deference" to both the factual findings and the Judicial Council's remedies. *See id.* at 4-7. In particular, the Review Committee considered Judge McBryde's challenge to the Special Committee's expansion of the investigation, *id.* at 7-10, his allegation that he received inadequate notice of the expansion of the investigation, *id.* at 10-11,

As its sole modification, the Review Committee authorized the Judicial Council to curtail the one-year period of Judge McBryde's new case assignment sanction if it "finds that Judge McBryde's conduct indicates that he has seized the opportunity for self-appraisal and deep reflection in good faith and that he has made substantial progress toward improving his conduct." *Id.* at 24.

**D. Proceedings in this Court**

On October 15, 1998, Judge McBryde filed an eight-count Complaint in this Court against the Review Committee and its chairperson, Judge Bauer, and against the Judicial Council and its chief judge, Chief Judge Politz. Five days later, on October 20, Judge McBryde filed a motion for a temporary restraining order. The United States moved, and on November 5, 1998 the Court granted its request, to intervene for the limited purpose of defending the Act against Judge McBryde's facial constitutional challenges. *See* Order of Nov. 5, 1998. Although Judge McBryde initially indicated his preference that the litigation proceed in three stages--a temporary restraining order, a preliminary injunction, and a trial on the merits for declaratory and injunctive relief--he agreed to the Court's proposal that, in the interests of conserving resources and achieving a prompt resolution of the issues, the latter two stages be consolidated. *See generally* Transcript of October 22, 1998 Phone Conference; Court's Order of October 23, 1998 (stating that "the Court's consideration of a preliminary injunction would be consolidated with a trial on the merits and adjudicated via cross-motions for summary judgment"). On November 2, 1998, the Court denied Judge McBryde's motion for a temporary restraining order, finding that Judge McBryde had not demonstrated that he would suffer irreparable harm if denied injunctive relief. *See generally* Mem. Op. and Order of

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and what the Review Committee labels "other procedural issues" raised by Judge McBryde, *id.* at 11-13. Ultimately, the Review Committee concluded that, under either a clear-and- convincing evidentiary standard or a preponderance-of-the-evidence standard, "the evidence adduced regarding Judge McBryde's patterns of conduct is more than sufficient to support the judicial council's findings." *Id.* at 19.

November 2, 1998; *CityFed Financial Corp. v. Office of Thrift Supervision,* 58 F.3d 738, 746 (D.C.Cir.1995) (enumerating the factors a district court should weigh in determining whether to grant a temporary restraining order). Notwithstanding his earlier agreement, and after the parties had fully briefed their cross-motions for summary judgment, Judge McBryde moved for a preliminary injunction on December 9, 1998. The Court denied this motion on January 5, 1999 for substantially the same reasons it denied Judge McBryde's earlier motion for a temporary restraining order. *See generally* Mem. Op. and Order of Jan. 5, 1999. On June 11, 1999, the Court conducted a hearing for oral argument on the remaining motions.

Judge McBryde also requested, in two separate motions, leave to take discovery in the form of depositions, and in a third motion to continue the pending cross-motions for summary judgment until he had the opportunity conduct those depositions. In particular, Judge McBryde sought to depose participants in the § 372(c) proceedings in the hopes of eliciting facts to controvert the portion of the Judicial Council's Order which asserts that the Council had considered the record, the Report, and Judge McBryde's responses thereto, for the purpose of fashioning its Order and Public Reprimand. The Court denied these motions on September 30, 1999, after determining that Judge McBryde had failed to make a sufficient showing of bad faith or improper motive to justify engaging in discovery. *See generally* Mem. Op. and Order of September 30, 1999; *see also Saratoga Development Corp. v. United States,* 21 F.3d 445, 458 (D.C.Cir.1994) (holding that, under the APA, discovery is warranted only "when 'there has been a strong showing of bad faith or improper behavior' (so that without discovery the administrative record cannot be trusted)") (quoting *Community for Creative Non-Violence v. Lujan,* 908 F.2d 992, 997 (D.C.Cir.1990)).

The Court also denied Judge McBryde's Motion to Deem Admitted Statement Contained in Statement of Material Facts. Judge McBryde contended that, since neither Defendants nor the United States had complied fully with the requirements of the District of Columbia Local Rule 7.1(h) (formerly 108(h)) (mandating that each party file a concise statement setting forth all material facts as to which a genuine issue exists), the Court

should act within its discretion to deem admitted the contents of his 7.1(h) Statement. The Court declined to do so, finding that the alleged deficiencies in Defendants' and the United States' responses to Judge McBryde's 7.1(h) Statement derived from their contention that the finality clause limited this Court's review to the findings contained in the Special Committee's Report, the Judicial Council's Order, and the Review Committee's Memorandum and Order. *See* Mem. Op. of Sept. 30, 1999 at 4-5. Finally, the Court issued an Amended Protective Order releasing certain aspects of the record from the prior sealing order and maintaining others under seal. The confidentiality of the record and the pleadings in this case has presented a series of issues which the Court has resolved along the way. A detailed discussion of these issues and their resolution appears *infra* in Section D of the Court's discussion.

## II. DISCUSSION

The Court has divided its discussion of the eight counts of Judge McBryde's complaint into four principal parts. First, the Court will consider Judge McBryde's contention that the Act is unconstitutional on its face because it violates the separation of powers doctrine. Second, the Court will examine its jurisdiction to entertain Judge McBryde's non-constitutional claims and his claims that the Act is unconstitutional as it has been applied to him.[12] Third, the Court shall consider the as-applied portion of Judge McBryde's separation of powers claim and his due process challenge to the Act's application. Finally, the Court will assess Judge McBryde's argument that the confidentiality clause violates the First Amendment.

### A. Judge McBryde's Claim that the Act is Facially Unconstitutional

In Count I of his complaint, Judge McBryde contends that "the Act is unconstitutional on its face as it applies to Article III judges because the Act empowers agencies of the Judicial Branch to punish, or change the status of, an Article III judge in violation of the constitutional scheme that the only procedure by which an Article III judge can be disciplined, or have his or her

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[12]The parties are in agreement that the finality clause does not bar review of Judge McBryde's facial constitutional claims.

status changed, is by impeachment through the constitutional impeachment process." Compl. ¶ 72. Judge McBryde acknowledges the legitimacy of three mechanisms for addressing claims of judicial misconduct: appellate or mandamus review by a duly constituted Article III court; impeachment by constitutionally ordained methods; or criminal prosecution. Under Judge McBryde's analysis, the Act runs afoul of this carefully balanced scheme by allowing the Judicial Branch to exercise Congress's exclusive impeachment power (Count I), and by authorizing administrative entities that are not Article III courts to conduct appellate review of his judicial decisions (Count II). As a result of these alleged incursions into the constitutionally protected sphere of judicial decision-making, Judge McBryde further contends that the Act compromises the constitutionally enshrined principle of judicial independence (Count III).

The Court's analysis of Judge McBryde's separation of powers claims is guided by *Mistretta v. United States,* 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), in which the Supreme Court rejected a separation of powers challenge to the Sentencing Guidelines promulgated by the United States Sentencing Commission. Analyzing the petitioner's claim that the Sentencing Reform Act violated the separation of powers principle, the Court carefully set forth the parameters of this important doctrine. The Constitution is not offended by some degree of commingling of functions among the three Branches, the Court held, so long as the challenged statute "pose[s] no danger of either aggrandizement or encroachment." *Mistretta,* 488 U.S. at 382, 109 S.Ct. 647 (citing *Morrison v. Olson,* 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (upholding judicial appointment of independent counsel); *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986) (upholding agency's assumption of jurisdiction over state-law counterclaims)). Thus, the Act will be unconstitutional only if it "accrete [s] to a single Branch powers more appropriately diffused among separate Branches or undermine[s] the authority and independence of one or another coordinate Branch." *Id.* Where, as here, the Judicial Branch is implicated in a separation of powers challenge, the

Court emphasized the need for particular "vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches,' and, second, that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch.' " *Id.* at 383, 106 S.Ct. 3245 (internal citations omitted). With these concerns in mind, the Court will turn to the merits of Judge McBryde's three separation of powers claims.

**1. Whether the Act Endows the Judicial Branch with Powers More Appropriately Exercised by Other Branches (Count I)**

At the heart of Judge McBryde's separation of powers argument is his contention that the Act impermissibly authorizes the Judicial Branch to exercise Congress's exclusive power to remove a sitting judge from office. Both the language of the Act and its legislative history, however, make it abundantly clear that the Judicial Branch is not so empowered. The Senate Judiciary Committee Report on the Judicial Council's Reform and Judicial Conduct and Disability Act of 1980 discussed this issue at length, carefully weighing contemporaneous suggestions that the Act's mechanisms might encroach on the impeachment power. *See* S.Rep. No. 96-362, at 4-6, *reprinted in* 1980 U.S.C.C.A.N. 4315, 4318-20. In response to concerns that removal of a sitting judge by any means other than impeachment would be unconstitutional, the statute was drafted to satisfy the "growing public demand for accountability" without interfering with the impeachment mechanism. *Id.* at 5. The language of the Act therefore expressly prohibits removal, providing that "in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior." 28 U.S.C. § 372(c)(6)(B)(vii). As an additional safeguard against encroachment of the impeachment power, the remedial measures are narrowly drawn such that they may not effect the removal of a sitting judge from office. *See id.* § 372(c)(6)(B)(iv) (granting power to suspend new case assignments, but only "on a temporary basis for a time certain"); *id.* § 372(c)(6)(iii) (authorizing the judicial council to request retirement, but not to order it).

Considering a similar attack on the constitutionality of the

Act, the Eleventh Circuit rejected "the argument that the Act is unconstitutional because any measures which may place pressure on a judge constitute a form of removal from office by means other than by impeachment." *In re Certain Complaints,* 783 F.2d 1488, 1507 (11th Cir.1986) ("*Hastings II*"). Similarly, the Senate Judiciary Committee concluded that the Act creates a "supplement to, but not a substitute for, the seldom used process of impeachment." *Id.* at 3. Because the scope of its remedial measures does not extend to actual removal from office, the Act plainly does not usurp or encroach upon the Legislative Branch's exercise of the impeachment power. *See Mistretta,* 488 U.S. at 393, 109 S.Ct. 647 (approving the location of the Sentencing Commission within the Judicial Branch, in part, because it does not "trench upon the prerogatives of another Branch").

Judge McBryde's alternative "absence of power" argument is equally devoid of merit. In this regard, Judge McBryde adopts the views espoused by Justices Black and Douglas dissenting in *Chandler. See Chandler v. Judicial Council of the Tenth Circuit,* 398 U.S. 74, 135-37, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970) (arguing that the constitutional silence as to other means of judicial discipline should be interpreted as an absolute prohibition) (Douglas, J., dissenting). Whereas Justice Douglas concluded that "[u]nder the Constitution the only leverage that can be asserted against [a sitting judge] is impeachment," *id.* at 136, 90 S.Ct. 1648, the view that ultimately carried the day held that the "extraordinary machinery of impeachment" cannot be the only recourse in cases of alleged judicial misconduct involving intemperate or abusive behavior, *id.* at 85, 90 S.Ct. 1648. *See also Mistretta,* 488 U.S. at 387, 109 S.Ct. 647 (noting that *Chandler* specifically upheld the Congress's ability to vest in judicial councils authority to "make all necessary orders for the effective and expeditious administration of the business of the courts"); *Hastings v. Judicial Conference of the United States,* 593 F.Supp. 1371, 1380 (D.D.C.1984) (Gesell, J.) (finding that the judiciary has the "inherent power" to take reasonable disciplinary measures), *aff'd in part and vacated in*

*part,* 770 F.2d 1093 (D.C.Cir.1985) ("*Hastings I* ").[13] In *Hastings II,* the Eleventh Circuit determined that the Act's remedial measures do not "intrude upon Congress's sole power of removal or impeachment." 783 F.2d at 1509. Read together, *Chandler* and *Hastings II* stand for the proposition that Congress's impeachment power presents no obstacle to attempts to enforce reasonable rules of conduct via sanctions short of removal. *See Chandler,* 398 U.S. at 85, 90 S.Ct. 1648 (confirming the judiciary's inherent authority to put its "own house in order"); *Hastings II,* 783 F.2d at 1509; *Hastings I,* 770 F.2d at 1099. Impeachment may be the only means of removing a judge, but the Court agrees with the Defendants that it is not the only means by which a judge can be disciplined for judicial intemperance and despotic behavior not always susceptible to review by other means.

**2. Whether the Act Threatens the Institutional Integrity of the Judicial Branch (Count III)**

There can be no question that the independence of the judiciary is a "fundamental precept[ ] upon which our systems of government is founded." *Hastings I,* 770 F.2d at 1104 (Edwards, J., concurring). In the hallowed words of Alexander Hamilton, the "independence of the judges is ... requisite to guard the constitution and the rights of individuals [against legislative encroachments and] from the effects of those ill humors which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves." The Federalist No. 78, at 527 (A. Hamilton) (J. Cooke ed.1961). Indeed, the Supreme Court has stressed "the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." *Chandler,* 398 U.S. at 84, 90 S.Ct. 1648; *see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 60, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (stating that the

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[13]On appeal, the bulk of Judge Gesell's decision was vacated on ripeness grounds, whereby the appellate court never reached its merits. Notwithstanding its lack of precedential authority, the Court shall occasionally cite to this opinion for its persuasive reasoning and thoughtful analysis of the merits of this issue.

Constitution "commands that the independence of the judiciary be jealously guarded, and ... provides clear institutional protections for that independence"). To that end, the Constitution guarantees that individual judges shall "hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. Art. III. § 1. These protections are counterbalanced to some extent by the impeachment power, which allows the Legislative Branch to remove judges from office under certain circumstances. *See id.*, art. I, §§ 2, 3. Together, these safeguards were designed to insulate the Judicial Branch--both the institution and the individual decision-makers that comprise it--from undue influence emanating from its coordinate Branches, while ensuring some degree of accountability.

Congress supplemented these constitutional measures almost immediately with various statutory limitations on the independence of individual judges. *See Hastings,* 593 F.Supp. at 1379 (providing examples of limitations placed on individual judges by the first Congress). Some examples curtailing particular activities include criminalization of bribery, Act of 1790, ch. 9, sec. 21, 1 Stat. 117; the recusal requirement, Act of May 8, 1792, ch. 36, sec. 11, 1 Stat. 278 (codified at 28 U.S.C. § 455); and the prohibition on the practice of law by judges, Act of December 18, 1812, ch. 5, 2 Stat. 788 (codified at 28 U.S.C. § 454). *See Hastings,* 593 F.Supp. at 1379. Over the years, as the Judicial Branch grew, its members came to recognize the need for "a statutory framework and power whereby they might 'put their own house in order.' " *Chandler,* 398 U.S. at 84, 90 S.Ct. 1648. This goal was first realized in 1939 with the creation of the judicial councils and the Judicial Conference, the constitutionality of which "seems to be established." *Hastings I,* 770 F.2d at 1099. The Judicial Conduct and Disability Act represents the latest in this series of measures designed to protect the integrity of the judiciary as a whole by placing limits on the independence of individual judges. *See* In re *Petition to Inspect,*735 F.2d 1261, 1265-66 (11th Cir.1984) (finding the broad purposes of the Act to be preservation of the integrity of the judiciary, maintaining public confidence in the judicial

process, and strengthening judicial independence). The Act is unique among these measures, however, in that it places the onus on the Judicial Branch actively to police the conduct of its own members, a responsibility willingly assumed by the Judicial Branch when it collaborated with Congress in fashioning this legislation.

Judge McBryde maintains that judicial independence resides primarily in the unfettered autonomy of individual judges, and that this independence is fatally compromised by giving one judge power over another. The *Chandler* Court divided on precisely this question. Writing for the Court, Justice Burger apparently rejected the notion "that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business." *Chandler,* 398 U.S. at 84, 90 S.Ct. 1648; *see Hastings II,* 783 F.2d at 1505 (reading *Chandler* "as rejecting any fixed notion ... that courts are mere collections of individual judges, each of whom is a complete law unto himself or herself."). Concurring in the judgment, Justice Harlan implicitly preferred institutional independence over individual independence when he specifically approved the judicial council's use of its statutory powers to remedy "what the Council members perceived as a threat to public confidence in the administration of justice." *Id.* at 125, 90 S.Ct. 1648. Judge McBryde's understanding of judicial independence, though, most closely approximates the dissenting views of Justices Black and Douglas, who would have held that the principle of judicial independence bars the judiciary from censuring or otherwise disciplining its own members. *See id.* at 136-38, 90 S.Ct. 1648. *Hastings II* characterized the difference between the *Chandler* majority and the dissenters as follows: "The key to the disagreement ... may well lie in the fact that whereas the dissenters saw the realm of judicial independence to be all-encompassing, the majority located a judge's protected independence more narrowly, 'in deciding cases or in any phase of the decisional function.' " *Hastings II,* 783 F.2d at 1506-07 (quoting *Chandler,* 398 U.S. at 84, 90 S.Ct. 1648). *Hastings II* went on to affirm that the judicial council's power to discipline "does not transgress the Constitution's vision of the independence of each Article III judge..... The judiciary could

hardly function if judicial councils were powerless to exercise powers of moral suasion or censure, where a judge is felt to be bringing discredit on the court through disability, infirmity, incompetence or misconduct." *Id.* at 1509; *see also* Harry T. Edwards, *Regulating Judicial Misconduct and Divining 'Good Behavior' for Federal Judges,* 87 Mich. L.Rev. 765, 784 (1989) (concluding that "individual judges are subject to some measure of control by their peers with respect to behavior or infirmity that adversely affects the work of the court and that does not rise to the level of impeachable conduct").

In light of these precedents, the Court rejects Judge McBryde's argument that judge-on-judge discipline is inherently unconstitutional.[14] As the framers of the 1990 amendments to the Act recognized, judicial independence and judicial accountability "are partners in maintaining the respect and confidence necessary to the effectiveness of the Federal judiciary." H. Rep. No. 101-512, at 8 (internal quotations omitted), *reprinted in* 1990 U.S.C.C.A.N. 6879, 6882. The Court concurs with Judge Gesell's observation that "the Framers never intended that the independence of any one officeholder, including judges, be so absolute as to threaten the integrity and orderly functioning of that officeholder's branch of government." *Hastings,* 593 F.Supp. at 1379. In order to answer the question of whether the Act erodes judicial independence, the Court must consider both the independence of individual judges and the independence of the judiciary as an institution.

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[14]This is not to suggest that the such a scheme is without the potential for abuse. As Judge McBryde forcefully contends, the Act could be used as a means of hazing judges whose views do not comport with those held by their colleagues. A full-blown investigation undoubtedly takes its toll on a subject judge in terms of time, money, and potential damage to reputation. Judge McBryde's claim that the Defendants have used the Act to undermine his independence will be analyzed in the context of his as-applied claims. For now, the Court simply notes that the mere *potential* for abuse does not render the Act facially invalid where its legitimate uses remain within constitutional bounds and it places no undue burden on judicial independence. *See Hastings II,* 783 F.2d at 1508 (balancing the personal pressures placed on a subject judge against institutional values of judicial independence).

*See, e.g., Hastings II,* 783 F.2d at 1509 (evaluating separation of powers challenge to the Act by balancing the pressure placed on individual judges against institutional values).

Ultimately, Judge McBryde's facial judicial independence challenge fails because the powers exercised by the Judicial Branch under the auspices of the Act are not incompatible with the central mission of that Branch. *See Mistretta,* 488 U.S. at 388, 109 S.Ct. 647. Rejecting a similar argument raised by Judge Hastings, the Eleventh Circuit wrote that the Act "does not ask judges to promote some interest lying outside the immediate concerns of the judicial branch, nor does their membership on investigating committees and judicial councils make them less impartial." *Hastings II,* 783 F.2d at 1504 (contrasting judicial participation in addressing allegations of judicial misconduct with judicial participation in fighting organized crime). To the contrary, *Hastings II* found that "the investigating judges here are concerned solely with matters affecting the management and reputation of the judiciary itself." *Id.* The most natural guardians of judicial independence are judges themselves, whose interests are most closely aligned with those of the subject judge. Judge Edwards' commentary underscores this point:

> Judges cherish the principle of judicial independence. Every judge understands that judicial independence would be lost if individual judges were allowed to be dominated by the group. If one individual must forfeit his or her independence, a precedent is established that will threaten every member of the group. Judges will not tolerate this; thus, no member of the group is likely to discipline another without great caution..... Overall, judges' naturally empathetic and disapproving impulses will blunt each other, leaving them as the best people, from a practical standpoint, to carry out the judicial policing function.

Edwards, *Regulating Judicial Misconduct,* 87 Mich. L.Rev. at 780. Indeed, no other Branch could perform this essential function without raising serious separation of powers objections. *Hastings II,* 783 F.2d at 1505. The integrity of the institution, with respect to both public trust and freedom from outside influence, can be preserved only if judges shoulder the difficult

responsibility of monitoring their own conduct. Judicial supervision fortifies judicial independence and thus must be entrusted only to the judiciary.

**3. Whether the Act Allows Improper Exercise of Article III Power (Count II)**

The third and final manifestation of Judge McBryde's facial challenge to the Act on separation of powers grounds is his argument that the Act authorizes administrative bodies within the Judicial Branch to sanction a judge because of disagreement with the merits of his or her rulings, effectively reversing his or her judicial decisions outside the constitutionally mandated confines of an Article III court. On its face, however, the Act clearly precludes review of a judge's judicial decisions. Section 372(c)(3) provides that the chief judge may dismiss a complaint "if he finds it to be ... directly related to the merits of a decision or procedural ruling." 28 U.S.C. § 372(c)(3)(A). Congress enacted this provision in order to "protect the independence of a judge in making decisions by precluding use of the complaint mechanism to collaterally attack rulings." *In re Complaint of Judicial Misconduct,* 37 F.3d 1511, 1515 (U.S.Jud.Conf.1994) (citing H.R.Rep. No. 96-1313, at 10 (1980)); *see also McBryde I,* 117 F.3d at 230 (finding that the Act prohibits review of the merits of judicial decision). This provision serves as an additional bulwark against incursions into the constitutionally protected sphere of judicial decision-making.

For this reason, the Act presents no facial violation of Article III's case and controversy requirement. In *Mistretta,* the Court squarely held that judges could serve on the Sentencing Commission even though the Commission's work did not involve the exercise of judicial power in the "constitutional sense of deciding cases and controversies." *Mistretta,* 488 U.S. at 389, 109 S.Ct. 647. The Court reached this conclusion in large part because it found that the responsibilities shouldered by the judges on the Commission were closely related to the central mission of the judiciary. *See id.* at 391, 109 S.Ct. 647. By the same token, there is nothing inherently objectionable about a group of judges acting in an administrative capacity to investigate and remedy "conduct prejudicial to the effective and expeditious administration of the business of the courts." 28

U.S.C. § 372(c)(1); *Hastings II,* 783 F.2d at 1506-07. As the Court commented in *Chandler,* albeit in dicta, "[w]e can see no constitutional obstacle preventing Congress from vesting in the Circuit Judicial Councils, as administrative bodies, authority to make 'all necessary orders for the effective and expeditious administration of the business of the courts within (each) circuit.' " *Chandler,* 398 U.S. at 85 n. 7.

Having considered each of Judge McBryde's arguments that the Act is unconstitutional on its face because it upsets the balance of power among the three Branches, the Court concludes that the Act passes constitutional muster. The Act does not encroach upon Congress's impeachment powers, nor is it "preempted" by those powers. The tasks assigned to the judicial councils are essential to the central mission of the Judicial Branch, and could not be lodged elsewhere without occasioning grave concern. With the active assistance of the Judicial Branch, Congress painstakingly drafted the statute to avoid precisely these concerns. Judge McBryde has highlighted several areas where the Act's mechanisms could be used for nefarious purposes, but the potential for abuse is clearly outweighed by the Act's important role in preserving and protecting judicial independence. Upon close scrutiny, the Court concludes that Judge McBryde's claims that the Act violates the separation of powers doctrine are " 'more smoke than fire,' and do not compel us to invalidate Congress's considered scheme for resolving the seemingly intractable dilemma" of remedying judicial misconduct. *Mistretta,* 488 U.S. at 384, 109 S.Ct. 647.

**B. Potential Limits on this Court's Jurisdiction**

Before turning to the merits of Judge McBryde's remaining claims--which range from constitutional challenges to the validity of the Act as it was applied to him, to very specific claims that certain aspects of the investigation violated the Act and the Complaint Rules--the Court must first consider what limits, if any, the Act's finality clause, 28 U.S.C. § 372(c)(10), places on this Court's jurisdiction over Judge McBryde's claims. Section 372(c)(10) states in relevant part that "all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." The parties agree that this section does not

deprive the Court of jurisdiction to hear Judge McBryde's facial constitutional claims, but its application to Judge McBryde's as-applied and statutory claims is hotly contested. Relying on the Supreme Court's directive that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review," *see Abbott Laboratories v. Gardner,* 387 U.S. 136, 141, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) (citations omitted), Judge McBryde suggests that the only aspect of the proceedings insusceptible to review is the Judicial Council's 1997 Order. The Defendants take a much broader view of the finality clause, arguing that it deprives this Court of jurisdiction to hear any non-constitutional claims or as-applied constitutional claims. In order to resolve this difficult issue, which will have a profound impact on the Court's resolution of Judge McBryde's remaining claims, the Court must consider the express language of the statute, "the structure of the statutory scheme, its objectives, its legislative history and the nature of the administrative action involved." *Block v. Community Nutrition Institute,* 467 U.S. 340, 345, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984).

On its face, the finality clause "expressly limits the availability of review of orders and determinations made under the Act." *Hastings I,* 770 F.2d at 1096. Section 372(c)(10) defines a narrow universe of options for a complainant, judge, or magistrate aggrieved by decisions rendered during the course of a § 372(c) proceeding. *See* 28 U.S.C. § 372(c)(10). If a complainant, judge, or magistrate is aggrieved by a final order of the chief judge, he or she may petition the judicial council of the circuit for review. *See id.* Similarly, a person aggrieved by an action of the judicial council may petition the Judicial Conference for review. *See id.* Aside from those enumerated avenues of redress, the finality clause declares that "all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." *Id.*

At the motions hearing, counsel for Judge McBryde urged the Court to take a very narrow view of the phrase "orders and determinations" as it is used in the finality clause. *See* Transcript of June 11, 1999 Hearing at 43-47 ("Tr."). According

to Judge McBryde, the "orders" covered by the finality clause are those orders issued by the Judicial Council pursuant to § 372(c)(6); "determinations" refer to determinations by the judicial council that a subject judge's conduct might constitute grounds for impeachment or is not amenable to resolution by the judicial council, *see* § 372(c)(7)(B), or a determination by the Judicial Conference that consideration of impeachment is warranted, *see* § 372(c)(8). Taking this argument to its logical conclusion, the phrase "orders and determinations" would encompass only the Council's December 31, 1997 Order. All other aspects of the § 372(c) proceedings would be subject to review, including the findings contained in the Special Committee's Report and the Review Committee's September 18, 1998 Order.

Assuming that Judge McBryde is correct as a matter of statutory interpretation, his desired result--de novo review of the Special Committee's report--does not necessarily follow. The Judicial Council's 1997 Order adopted "by a clear majority vote the Special Committee's Report, Findings of Fact, and Recommendations." Admittedly, the Council did so only "to the extent relevant to the action taken below," which qualification renders it impossible to discern the precise basis for the Order. But the fact remains that the finality clause leaves all aspects of the Order "final and conclusive." The Court cannot "question the wisdom" of the Special Committee's Report, as Judge McBryde urges, without questioning the wisdom of the Judicial Council's Order, which Judge McBryde concedes is not subject to judicial review. Judge McBryde's suggested approach would require the Court to revisit all of the testimony and all of the exhibits that were considered by the Special Committee during several weeks of hearings, adopted by a clear majority of the Judicial Council, and ultimately affirmed by the Review Committee. Needless to say, this course of action would completely eviscerate the finality clause. Even if Judge McBryde is correct that the phrase "orders and determinations" does not directly encompass the Special Committee's Report because it is neither an order nor a determination, the plain language of the statute renders the Special Committee's findings

binding on this Court by virtue of the Judicial Council's unreviewable Order adopting those findings.

The few reported decisions construing the finality clause have done so in dicta, *see, e.g., McBryde II,* 120 F.3d at 520 n. 1 (noting in passing that any arguments "concerning dismissal of Judicial Conference proceedings should be directed to that body and not to this court"), or their continuing validity is called into question by subsequent decisions, *see, e.g., Hastings,* 593 F.Supp. at 1377-78 (affirmed in part and vacated in part by later *Hastings* decisions). Although this Court may not technically be bound by these decisions, the weight of the authority suggests that the finality clause should be interpreted broadly to preclude judicial review of all claims that do not rise to the level of constitutional challenges. In Judge Gesell's *Hastings* decision, for example, he examined the language of the clause, the legislative history, and various Supreme Court precedents, and concluded that Congress had intentionally established an "absolute bar against judges under inquiry seeking judicial review of actions taken against them pursuant to the Act." *Hastings,* 593 F.Supp. at 1378. In the same vein, the Fifth Circuit noted that "Congress has made crystal clear its intent that the federal courts as such exercise no appellate jurisdiction" over claims arising out of § 372(c)(10) proceedings. *See McBryde I,* 117 F.3d at 220 n. 7; *see also McBryde II,* 120 F.3d at 523 (finding that § 372(c)(10) "unambiguously forecloses judicial review" of the Judicial Conference's orders and determinations). *But see Hastings I,* 770 F.2d at 1109 (Edwards, J., concurring) (commenting that the scope of § 372(c)(10) is ambiguous). At the same time that they militate against judicial review, however, these cases also make clear that the finality clause is no bar to review of *constitutional* challenges to the Act. *See Hastings,* 593 F.Supp. at 1378 (holding that "the Act does not bar judicial review of the facial validity of the statute itself"); *see also Hastings I,* 770 F.2d at 1109 (Edwards, J., concurring) (raising questions about any interpretation of § 372(c)(10) that would bar constitutional claims); *Hastings III,* 829 F.2d at 108 n. 69 (on the question of whether the court could hear plaintiff's due process challenges to the Act as-applied, noting that "sensitive and unsettled questions of

constitutional law would arise if the challenged actions are covered by the prohibition on judicial review"). On balance, the Court finds that the finality clause must be construed so as to bar Judge McBryde's statutory claims while preserving his right to challenge the constitutionality of the Act, both on its face and as it was applied to him by the Defendants.

Notwithstanding the foregoing analysis, Judge McBryde maintains that the Court has jurisdiction to hear his non-constitutional claims to the extent that the Defendants exceeded their delegated powers or acted "contrary to a specific prohibition in the Act." *Leedom v. Kyne,* 358 U.S. 184, 188, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). *Leedom v. Kyne* considered the question of whether the district court had jurisdiction of an original suit to vacate an otherwise unreviewable determination made by the National Labor Relations Board, where there was no dispute that the Board's determination was made in excess of its statutory powers. *See id.,* 358 U.S. at 185, 79 S.Ct. 180. The Court held that the district court did have jurisdiction to hear the suit, distinguishing between claims that the Board had acted in excess of its delegated powers or contrary to a specific prohibition in the National Labor Relations Act and suits to "review" a decision of the Board as such. *See id.* at 188, 79 S.Ct. 180. Because the Board had attempted to exercise a power that Congress had specifically withheld, the Court reasoned that the district court should have jurisdiction of an original suit in order to prevent deprivation of the plaintiffs' statutory rights. *See id.* at 189, 79 S.Ct. 180.

In *Dart v. United States,* 848 F.2d 217 (D.C.Cir.1988), this Circuit clarified that the *Leedom v. Kyne* exception is available only to review *facial* violations of a given statute. *See Dart v. United States,* 848 F.2d at 231. Like § 372(c)(10), the finality clause at issue in *Dart* provided that "[t]he order of the Secretary shall be final and is not subject to judicial review." 50 U.S.C. § 2412(c)(1) (Supp. III 1985). The plaintiff maintained that he was entitled to judicial review of the Secretary's decision despite the finality clause because the Secretary had exceeded his statutory authority. Without examining the underlying decision on its merits, the *Dart* court concluded that the contested order violated the relevant statute "on its face." *Dart,*

848 F.2d at 231. *Dart* cautioned, however, that the *Leedom v. Kyne* exception for review of facial violations must "remain narrow":

> Congress' finality clause must be given effect, and an agency action allegedly "in excess of authority" must not simply involve a dispute over statutory interpretation or challenged findings of fact.... [T]he invocation of *Leedom v. Kyne* jurisdiction is extraordinary; to justify such jurisdiction, there must be a "specific provision of the Act which, although it is clear and mandatory, was nevertheless violated."

*Dart,* 848 F.2d at 231 (internal citations and quotations omitted). Mindful of the Supreme Court's admonition that courts "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers," *Leedom v. Kyne,* 358 U.S. at 190, 79 S.Ct. 180, this Court must consider whether Judge McBryde has demonstrated the sort of facial statutory violation contemplated by *Dart.*

Judge McBryde contends that the Defendants committed two such statutory violations. First, Judge McBryde charges that Committee imposed sanctions upon him that were improperly based on evidence not pertaining to any of the five official complaints before the Special Committee. Tr. at 56. Second, he claims that the Defendants exceeded the "jurisdictional mandate of the statute ... by reviewing Judge McBryde's decisions and punishing him for those decisions." Tr. at 55.

**1. Expanded Scope of the Investigation**

The section 372(c) proceedings found their genesis in a series of five complaints concerning Judge McBryde. Of the five complaints, four were identified by Chief Judge Politz. *See* 28 U.S.C. § 372(c)(1) (authorizing the chief judge to "identify" a complaint in lieu of a written complaint filed with the clerk of the court of appeals). Chief Judge Politz established the Special Committee to investigate these complaints, *see id.* § 372(c)(4)(A) (appointment of the special committee by the chief judge), and the Special Committee elected to expand the scope of the investigation into broader areas of concern suggested by the five complaints, *see id.* § 372(c)(5) (permissible scope of the

special committee's investigation). Judge McBryde maintains that the Council's sanctions and public reprimand arose out of this "unbridled investigation," rather than out of a finding that any of the five complaints was meritorious. *See* Pl.'s Stmt. at 39. As Judge McBryde views it, these deficiencies render the entire process flawed.

The problem with Judge McBryde's argument is that the Act contains no such limitations on the Special Committee's power to expand the scope of the investigation, nor does it mandate that the Judicial Council's remedial actions be based on a meritorious complaint. Section 372(c)(4)(A) clearly empowers the special committee to "conduct an investigation as extensive as it considers necessary." 28 U.S.C. § 372(c)(4)(A).[15] The report that the special committee prepares must include the "findings of the investigation" and "recommendations for appropriate and necessary action by the judicial council of the circuit," but "findings on the complaint" are not a prerequisite to judicial council action under § 372(c)(6). *See id.* §§ 372(c)(5), (c)(6). In addition, the Act specifically authorizes the Chief Judge to "identify" a complaint. *See id.* § 372(c)(1). Neither the identification of the complaints nor the expanded scope of the investigation were clearly in excess of the Defendants' statutory authority, therefore they cannot be used to invoke *Leedom v. Kyne* jurisdiction. *See Dart,* 848 F.2d at 231.

**2. "Merits-Relatedness"**

Judge McBryde's contention that the Defendants reviewed the merits of his judicial decisions and punished him for disagreement with his judicial philosophy recurs throughout his complaint. In the context of his as-applied separation of powers claims, this theory supports his argument that the Defendants impermissibly exercised Article III powers, as well as his assertion that the proceedings compromised his judicial independence. His statutory claims are also predicated on this characterization of the Judicial Council's order. As a matter of

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[15]Complaint Rule 9(A) is not to the contrary: it also permits the special committee to expand the scope of its investigation "[i]f the committee concludes that the judge may have engaged in misconduct beyond the scope of the complaint." *See* 5th Cir. Compl. R. 9(A) (Pl.'s Ex. 143).

immediate concern, the Court must assess the availability of *Leedom v. Kyne* jurisdiction to review Judge McBryde's non-constitutional claims, but the answer to this question will also substantially shape the Court's approach to Judge McBryde's remaining claims. The threshold inquiry is whether the scope of the Defendants' investigation and the basis for the remedial measures they imposed on Judge McBryde crossed the line into the protected sphere of judicial decision-making. If so, the Court must determine whether this transgression violates a clear and mandatory provision of the Act.

The vast majority of the evidence presented to the Special Committee consisted of testimony pertaining to how Judge McBryde behaves when he conducts trials and other proceedings, and how Judge McBryde interacts, both formally and informally, with attorneys, judges, and other courthouse personnel. The Special Committee digested this evidence and determined that the reported incidents "bespeak several alarming patterns of conduct exhibited by Judge McBryde over the course of his tenure on the bench." Special Committee Report at 124. Five broad tendencies emerged, all of which combined to paint Judge McBryde as a jurist plagued by intemperance, abusiveness, and a profound lack of collegiality. On the strength of the Special Committee's Report, Findings of Fact, and Recommendations, which the Council adopted "[t]o the extent relevant below," the Council issued its 1997 Order and Public Reprimand. *See* 1997 Order.

When Judge McBryde petitioned the Review Committee for relief from the Judicial Council's Order, one of the central themes of his petition was that essentially all of the conduct for which the Council had sanctioned him directly related to the merits of a decision or procedural ruling. *See* Review Committee's 1998 Order at 15. Judge McBryde argued to the Review Committee, as he argued to the Special Committee and as he argues in the case at bar, that a judge cannot be sanctioned for a pattern of allegedly improper rulings any more than he or she can be sanctioned for a single allegedly improper ruling. While affirming Judge McBryde's basic position that it would not be permissible to sanction a judge based on disagreement with the merits of his rulings, both the Special Committee and

the Review Committee soundly rejected Judge McBryde's contention that the Special Committee and the Judicial Council had violated this rule. The Review Committee reasoned as follows:

> Although a judge indeed may not be sanctioned out of disagreement with the merits of his rulings, a judge certainly may be sanctioned for a consistent pattern of abuse of lawyers appearing before him. The fact that that abuse is largely evidenced by the judge's rulings, statements, and conduct on the bench does not shield the abuse from investigation under the Act.... To say that abuse of lawyers, or other forms of misconduct, that finds expression in a judge's rulings may be remedied under the Act is *not* to say that a judge's rulings themselves may be challenged under the Act.

Id. (emphasis in original); *see also* In re *Complaint,* 37 F.3d at 1515 (finding that "the central thrust of the Act is to make judges accountable for precisely this sort of conduct: conduct not related to the merits of rulings that arises in the course of the performance of judicial duties"). Distinguishing the complaints against Judge McBryde from numerous other complaints that were packaged as conduct-related but dismissed as merits-related, the Review Committee found that "the claims of improper conduct were supported by considerable substance" evidencing judicial intemperance and abusive behavior. Review Committee Order at 17.

The Review Committee's analysis reflects deep respect for the important distinction between the merits of a judicial decision and the conduct of the judge rendering that decision. Although the line between merits and conduct is "not always easily found," *McBryde I,* 117 F.3d at 230, courts have been able to draw a meaningful distinction between legal or factual determinations, on the one hand, and a judge's courtroom demeanor, on the other hand. In *McBryde I,* for example, the Fifth Circuit concluded that the Judicial Council had ventured into forbidden territory by removing two cases from Judge McBryde's docket after he made certain controversial credibility determinations. *See id.* (citing *United States v. Washington,* 98 F.3d 1159, 1165 n. 1 (9th Cir.1996) (stressing that the judicial

council cannot address matters that might be raised through normal channels of appellate review)). Although the Judicial Council ostensibly acted to remedy "judicial misconduct," the Fifth Circuit found that the Judicial Council had in fact sanctioned Judge McBryde based on the merits of his decisions. The court noted, however, that a different outcome might result if there were " 'any indication of a broader pattern of conduct evidencing incapacity, arbitrariness, or neglect of office.' " *Id.* at 230 (quoting In re *Charge of Judicial Misconduct,* 613 F.2d 768, 769 (9th Cir.1980)).

The Judicial Conference of the United States has recognized that its own limited jurisdiction excludes specifically legal or constitutional questions. *See* In re *Complaint of Jud. Misconduct, No. 84-372-001,* Jud. Conf. of the U.S., at 6 (stating that "[w]e have no competence to adjudicate the facial constitutionality of the statute or its constitutional application to the speech of the accused judge .... We are not a court."). On numerous occasions, circuit judicial councils have dismissed complaints which essentially challenge the merits of judicial rulings. For instance, the First Circuit Judicial Council dismissed a complaint alleging misconduct on the part of a judge on the grounds that it "directly related to the merits of decisions or procedural rulings of the judge complained against." In re *Complaint No. 157* at 2, Aug. 4, 1994 (citing 28 U.S.C. § 372(c)(3)(A)(ii)). In that instance, unlike those that emerged out of the investigation into Judge McBryde's behavior, the complaint suggested that the judge harbored improper animus against the complainant without providing any "factual support whatsoever, beyond the allegedly erroneous rulings themselves, to suggest that the judge may have acted with any improper motivation." *Id.* Similarly, when an attorney filed a section 372(c) complaint against a district court judge protesting that the judge had issued an erroneous judgment holding the complainant personally liable for a large sum of money as reimbursement for attorneys fees, the First Circuit Judicial Council dismissed the complaint. *See* In re *Complaint No. 159,* Sept. 7, 1994, at 4. Although conceding that the judgment was indeed erroneous, the Judicial Council wrote that "Complainant's proper recourse to challenge these rulings was

by way of motion in the district court and, if necessary, appeal to the court of appeals, not by way of a complaint of judicial misconduct under § 372(c)." The Judicial Council recognized that it lacked jurisdiction over a complaint "directly related to the merits of decisions or procedural rulings." *Id.* at 2.

Dismissing one complaint, the Fourth Circuit Judicial Council noted that "[i]t is not proper to utilize the Act if other suitable judicial remedies are available ...." That Judicial Council again dismissed a complaint that sought the recusal of a judge from a particular case. The complainant based the request for recusal on a colloquy between the judge and counsel in which the judge "challenged the strength of the positions articulated by complainant...," and a later settlement discussion in which the judge used strong language to express doubt about complainant's assessment of the damages potential of his claim. *See* In re *Complaint No. 121,* Mar. 12, 1993. The Council emphasized that a judge "is accorded wide latitude to comment on a case in colloquy with counsel and the parties in managing the pursuit of litigation." *Id.* at 2. Mere comments that appear to challenge the merits of a claim or its monetary value do not rise to the level of judicial misconduct as contemplated by the Act.

Just as a body constituted under section 372(c) is not the appropriate forum to review the merits of decisions or procedural rulings, a court of appeals is not the appropriate forum to monitor and redress a judge's broad course of conduct consisting of abusive and intemperate behavior, unless it affects the merits in a given case. For example, the Fifth Circuit Court of Appeals reviewed the legal disposition of several cases in which Judge McBryde conducted himself so offensively that his actions ultimately came before the Special Committee. *See, e.g., Dawson v. United States,* 68 F.3d at 886; *Van Waeyenberghe,* 990 F.2d at 845. Although both the *Dawson* and the *Van Waeyenberghe* courts remarked upon certain aspects of Judge McBryde's conduct, these remarks remained peripheral to the opinions and finally irrelevant to the legal resolution of the cases. Additionally, while a court of appeals may review a lower court's legal conclusions and a given judge's conduct in isolated instances, a judicial council is able to examine a judge's course of conduct as it ranges over many interactions.

Therefore, contrary to Judge McBryde's assertion, appellate review is not always an adequate means of addressing this problem. Consider the interaction between judge and attorney: A judge's treatment of an attorney may not affect the outcome of a particular case or pending motion, thereby insulating it from review, and yet have a profound effect on the efficacy of the attorney's representation. The Special Committee heard evidence that Judge McBryde's courtroom conduct prevented some attorneys from building a record that would preserve their client's rights on appeal. In a smaller legal community, the impact of such intangible conduct is magnified, and yet the court of appeals can only rectify those instances that rise to the level of reversible error in a specific case. When the appellate court considered the merits of Judge McBryde's decisions, apart from an occasional remark about Judge McBryde's manner of dealing with the issue or attorney at hand, the court did not address a course of conduct involving multiple instances over many cases in which Judge McBryde's behavior reflected an abusive pattern.

Upon review of the Special Committee's Report, the Court finds that the Judicial Council did not repeat the mistakes that it made in *McBryde I*. Based on extensive testimony from witnesses regarding their experiences with Judge McBryde, the Special Committee identified certain patterns of conduct that prevented attorneys from zealously representing their clients. Rather than focusing on any one isolated event, the Special Committee examined a series of incidents and found, based on the totality of the circumstances, that Judge McBryde's conduct was having a deleterious effect on the entire legal community. *See* Report at 49-50. Significantly, there is no indication on the record that the Defendants or witnesses were motivated by ideological or political differences with Judge McBryde; the witnesses represented the entire legal community, including public defenders, prosecutors, private practitioners, and fellow jurists, and the conduct under scrutiny is not susceptible of any political categorization. Admittedly, some of the incidents that witnesses described were more egregious than others. Indeed some of the testimony was favorable to Judge McBryde. But looking at the Special Committee's conclusions on their face,

*see Dart,* (emphasizing that the Court is not to engage in factual disputes or matters of statutory application), the Court perceives no question that these conclusions emerged out of the Special Committee's assessment that the overall impact of Judge McBryde's conduct had far-reaching consequences that extended beyond the legal community to the general public.[16]

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[16]A pattern of conduct such as Judge McBryde has demonstrated raises profound concerns regarding not only the Fort Worth legal community, but also the American legal profession more generally. The question of civility and its regrettable decline among members of this profession has emerged as a major topic of concern among lawyers, judges, and legal scholars. *See, e.g.,* Symposium, *One Response to the Decline of Civility in the Legal Profession: Teaching Professionalism in Legal Research and Writing,* 51 Rutgers L.Rev. 889 (1999); Hon. Alva Hugh Maddox, *Lawyers: The Aritstocracy of Democracy or "Skunks, Snakes, and Sharks"?* 29 Cumb. L.Rev. 323 (1998-99); Hon. Marvin E. Aspen, *The Judiciary--New Issues and New Visions: Promoting Civility in Litigation,* 40 Fed. B. News & J. 496 (1993); ABA Comm. on Professionalism, *"In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism,* 112 F.R.D. 243 (1986). Many of these commentators have lamented the apparent lack of civility in the world of politics, and have noted the same trend in that of law. As Justice Anthony Kennedy reminded us, "[c]ivility has deep roots in the idea of respect for the individual ... respect [for] one another's human aspirations and equal standing in a democratic society." Justice Anthony M. Kennedy, *Address to 1997 ABA Ann. Meeting* (Summer, 1997, San Francisco, CA).

If incivility among lawyers threatens to bring the entire legal profession into disrepute, then a lack of civility in the judiciary promises to undermine profoundly American society's respect for the rule of law and its faith in the possibility of achieving just results. Chief Justice Warren Berger admonished his judicial colleagues almost thirty years ago: "Every judge must remember that no matter what the provocation, the judicial response must be judicious response and that no one more surely sets the tone and the pattern for courtroom conduct than the presider." Warren E. Burger, *The Necessity for Civility,* 52 F.R.D. 211, 215 (1971) (Text of speech delivered at the Opening Session, American Law Institute, May 18, 1971, Wash. D.C.). Judges occupy a unique, and uniquely powerful, role in American society; thus, when they behave toward attorneys (or litigants) in an intemperate, contemptuous, and arbitrary manner, the consequences extend beyond the immediate target of their actions. As Judge Louis Pollak, former law school dean and American Bar Association section chair, wrote: "when the target of a judge's unjustified polemic is a lawyer practicing in the judge's court--the

As a result, *Leedom v. Kyne* does not provide a basis for overriding the clear dictate of the finality clause.

**3. The Non-Constitutional Claims**

Judge McBryde's non-constitutional claims can be briefly summarized as follows. As described above, Judge McBryde claims that the Judicial Council exceeded its jurisdiction by reviewing the merits of his judicial decisions and procedural rulings, and by taking remedial actions based on the expanded investigation rather than the original five complaints (Count V). In support of his request for a writ of mandamus (Count VII), Judge McBryde argues that all five of the official complaints should have been dismissed because they were outside the scope of the Judicial Council's jurisdiction and unsupported by the evidence. Judge McBryde's primary argument that the Judicial Council violated the Act and the Complaint Rules (Count IV) essentially replicates his arguments in favor of mandamus and that the Judicial Council exceeded its jurisdiction: he contends that the complaints and the factual basis for the orders were merits-related, and that the Special Committee's findings do not support the Judicial Council's conclusion that Judge McBryde's conduct is prejudicial to the effective and expeditious administration of justice.[17] Based on the foregoing analysis of the finality clause, however, all three of these claims must be dismissed for lack of subject matter jurisdiction.

**C. As-Applied Constitutional Claims**

Having determined that the finality clause bars review of Judge McBryde's non- constitutional claims, the Court turns next to the as-applied constitutional claims. These include the remaining portion of Judge McBryde's separation of powers claims (Counts I, II and III) and his denial of due process claim

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harm to civility may be even more serious. This for the reason that the judge, speaking from a privileged sanctuary, is acting the bully and dishonoring the robe." Hon. Louis H. Pollak, *Professional Attitude,* A.B.A. J., Aug. 1998, at 66, 67. Indeed, the Act recognizes that a judge's conduct, if gratuitously abusive, is likely to exercise a pernicious influence upon the morale and efficacy of the legal profession and the administration of justice.

[17]The Court notes that all of these arguments were considered and found to be without merit by the Review Committee.

(Count VI). To some extent, these claims are coextensive with issues that have already been addressed or issues that are precluded by the finality clause. As for the remainder of Judge McBryde's as-applied claims, the Court finds that, with the exception of his First Amendment Claim, they are without merit.

**1. Separation of Powers**

The main thrust of Judge McBryde's claim that the Act is unconstitutional as it was applied to him is that "[h]e has been punished, and his judicial status has been altered, because of disagreements with the merits of his rulings and decisions ... [and] he has been subjected to a 'temporary impeachment.' " Pl.'s Stmt. at 5 (quoting *United States v. Avilez-Reyes,* 160 F.3d 258, 262 (5th Cir.1998) (Jones, J., dissenting)). Because the Court has already declined to adopt Judge McBryde's characterization of the Special Committee's Report, *see supra* II.B.2, there is no need to revisit his contention that the Defendants unconstitutionally interfered with his judicial independence by punishing him based on disagreements with his judicial philosophy or the merits of his rulings. Furthermore, Judge McBryde was not technically removed from office; his salary was not diminished, his judicial powers remain intact, and he has continued to decide cases and controversies. Thus, a constitutional violation will lie only if the remedial sanctions effectively removed Judge McBryde from office or significantly diminished his judicial independence.

Judge McBryde's public reprimand did not effect a removal from office, nor did it interfere with the protected sphere of judicial decision-making. Judges, like other public officials, frequently become targets of public criticism for their actions. Although the spirit of collegiality tends to shield judges from criticism from within the Judicial Branch, such criticism is not unheard of and has never been thought to create a problem of constitutional dimensions. Certainly, the public reprimand carried the added sting of the Judicial Council's imprimatur, but the Court sees no reason why the official stamp of the Judicial Council renders the reprimand unconstitutional.

Unlike the public reprimand, the assignment order and the disqualification order had a direct impact on Judge McBryde's docket. The assignment order interrupted the usual stream of

new cases for a period of one year, and the disqualification order prevents Judge McBryde from participating for a period of three years in any cases involving attorneys who took part as witnesses or prospective witnesses in the Special Committee's hearings. These measures are certainly more tangible, but their impact still does not approximate removal. Judge McBryde's caseload plummeted over the course of the year as a result of the assignment order, but neither his existing docket nor his power to manage it as he saw fit was impaired.[18] The disqualification order had a somewhat further reach,[19] but that order was both necessary and appropriate given the risk that Judge McBryde might engage in retaliation against witnesses and others. Both aspects of the Judicial Council's order were limited in scope, and tailored to the problem at hand. The Court is persuaded by the Defendants' arguments that all three aspects of the Judicial Council's order were constitutional.

**2. Due Process**

Judge McBryde enumerates a series of due process violations that purportedly infected each stage of the proceedings against him. The Court shall consider these alleged infringements of his due process rights by organizing them into three categories: (1) procedural irregularities; (2) structural defects; and (3) improper motives. Under the first category, he contends that the Special Committee engaged in "an illegal investigation" by broadening its review of Judge McBryde's activities beyond the purview of existing complaints against him. *See* Pl.'s Mot. Summ. J. at 98-99 ("[C]ounsel for the Special Committee combed the Fort Worth legal community for ammunition to further the goal of reviewing Judge McBryde's entire judicial career."). Moreover, Judge McBryde alleges that

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[18]Some jurists have expressed concern that suspension might become equivalent to removal if it extended for an inordinate amount of time, *see e.g., Hastings I,* 770 F.2d at 1108-09 (Edwards, J., concurring) (using fifteen years as the benchmark), but a one-year suspension does not implicate these concerns.

[19]As a result of this order, thirty-three of the cases on Judge McBryde's docket were reassigned to other judges.

he was denied adequate notice, having received the Special Committee's 159-page report a mere twelve days before the Judicial Council's December 17 meeting, and that he was the victim of a "rush to judgment" on the Judicial Council's part. In both of these respects, he maintains, he suffered a violation of his due process rights. *See id.* at 99-101. Finally, Judge McBryde complains that the Special Committee and the Judicial Council deprived him of his constitutionally mandated right to a fair hearing by permitting, and then predicating judgment upon, hearsay testimony, gossip, polls, rumor, and "local knowledge." *See id.* at 105-08.

In addition, Judge McBryde argues that certain structural defects in the division of labor between the various entities constituted to investigate, adjudicate, and review the merits of the complaints against him amounted to an unconstitutional deprivation of due process. Under this rubric, Judge McBryde points to the deference accorded by the Judicial Council to the Special Committee's findings, and in turn the deference accorded by the Review Committee to the Judicial Council's judgment. *See id.* at 101-05. ("The Review Committee deferred to the judgment of the Council, which had deferred to the Report of the Committee. No entity with authorization under the Act to decide Judge McBryde's fate made a reasoned decision."). In a related vein, Judge McBryde asserts that the proceedings, particularly the dual service of four Special Committee members as participants in the Judicial Council, applied the Act impermissibly to combine investigative and adjudicative functions. *See id.* at 114-16.

Finally, Judge McBryde impugns the motives of several judges who served on the various bodies involved in the proceedings. He maintains, as an initial matter, that the actions taken against him issued out of a retaliatory motive, and thus were riddled with vindictiveness. *See id.* at 110-14. Judge McBryde also levels the quite serious charge that bias and prejudice on the part of the investigating and adjudicating officials poisoned the proceedings against him, thereby depriving him of an impartial tribunal. *See id.* at 108-10.

Both Defendants and the United States have argued that, because he raised most of these allegations in great detail and at

great length before the Review Committee of the Judicial Conference, and because the Review Committee dismissed them in its September 18, 1998 Order, Judge McBryde is effectively precluded from raising issues relating to alleged procedural errors and unfairness in the context of the Special Committee hearings and the Judicial Council's judgment. *See, e.g.,* Def.'s Mem. Opp. Pl.'s Mot. Summ. J. at 21. Defendants have maintained throughout this action that the finality clause deprives this Court of jurisdiction over many of the grievances Judge McBryde has raised regarding the investigatory and, ultimately, disciplinary process he endured in response to complaints about his abusive behavior. If, as Defendants maintain, section 372(c)(10) prohibits this Court from hearing the allegations that Judge McBryde presented to the Review Committee, albeit in a different form, then for the Court to render a decision with respect to any of these allegations would be for the Court to transgress its Article III function by issuing an advisory opinion. *See* U.S. Const. Art. III § 2 (conferring jurisdiction over cases and controversies).

At the motions hearing, however, counsel for Defendants conceded that "Judge McBryde can make an as-applied constitutional challenge, but he has to make it in the context of the findings of the special committee and the council as affirmed by the review committee." Tr. at 50. This rather circular logic promises to yield absurd results. If the Court found this logic persuasive, it would retain jurisdiction over Judge McBryde's claims only to the extent they do not conflict with either the findings of the Special Committee and Judicial Council, or the reasoning of the Review Committee. In effect, Judge McBryde would be precluded from raising his due process challenges with respect to all claims that received attention at those earlier stages; yet Judge McBryde wishes precisely to challenge aspects of those earlier proceedings on constitutional grounds. While Judge McBryde raised numerous allegations of procedural unfairness and violations of both the Act and the Fifth Circuit Complaint Rules before the Review Committee,[20] these did not expressly implicate constitutionally

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[20]Rule 9(A) of the Rules Governing Complaints of Judicial

mandated rights. As the Court concluded above in its discussion of the finality clause, Judge McBryde may bring his claims challenging the constitutionality of the Act both on its face and as applied to him, including those alleging procedural flaws of constitutional magnitude. *See supra* section B.

The Court is mindful that, as the Supreme Court wrote over three decades ago, "[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." *In re Gault,* 387 U.S. 1, 19-20, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). The rules that govern adversarial proceedings are the "instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. 'Procedure is to law what "scientific method" is to science.' " *Id.* at 21, 88 S.Ct. 55. Time and again the Supreme Court has emphasized that, at minimum, the Due Process Clause requires notice and an opportunity to be heard. *See, e.g., Cleveland Bd. of Ed. v. Loudermill et al.,* 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (enunciating basic requirements where individual stands to be deprived of significant property interest, here public employment); *Morrissey et al. v. Brewer,* 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (listing the minimum due process requirements for parole revocation, to wit: (1) written notice of the claimed parole violations; (2) disclosure of the evidence against the parolee; (3) opportunity to be heard and to present witnesses and evidence; (4) right to confront and to cross- examine adverse witnesses; (5) a "neutral and detached" hearing body; (6) and a written statement by the factfinders

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Misconduct or Disability provides in full:

> Each special committee will determine the extent of the investigation and the methods to be used. It the committee concludes that the judge may have engaged in misconduct beyond the scope of the complaint, it may expand that scope to encompass such misconduct, timely providing written notice of the expanded scope to the subject judge.

5th Cir. Compl. R. 9(A) (Pl.'s Ex. 143).

documenting evidence relied on and their reasoning); *In re Ruffalo,* 390 U.S. 544, 551, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (construing state disbarment proceedings as "adversary proceedings of a quasi-criminal nature," and therefore as requiring notice and an opportunity to be heard). As these and other Supreme Court cases make evident, "due process is flexible and calls for such procedural protections as the particular situation demands. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for some kind of procedure." *Morrissey,* 408 U.S. at 481, 92 S.Ct. 2593.

According to these precedents, then, Judge McBryde was undeniably afforded the most basic elements of due process. Thus, while the Supreme Court has on numerous occasions and in a variety of contexts enunciated minimum standards of constitutionally required due process, such discussions offer this Court no yardstick by which to measure, for example, precisely how much notice or how extensive an opportunity to be heard someone in Judge McBryde's position merits. Nor, for that matter, do the parties offer the Court any basis upon which to draw finer distinctions with respect to Judge McBryde's exact entitlements or the absence thereof. Accordingly, the Court shall evaluate each of Judge McBryde's due process claims with an eye toward all of the circumstances surrounding the investigation and adjudication of the complaints against him.

**a. Procedural Irregularities**

In arguing that the Special Committee conducted an "illegal investigation" by broadening its scope beyond the specific incidents alleged in the five original complaints, Judge McBryde essentially dresses up a rules violation claim as a deprivation of constitutional due process. Although his counsel objected to the Special Committee's "roving" investigation, the Special Committee continued to gather witnesses and incidents that established a pattern of conduct on Judge McBryde's part in anticipation of its upcoming hearings. *See* Pl.'s Mot. Summ. J. at 98-99; *see also* September 18, 1998 Order at 7-10. Judge McBryde points to no specific procedural rights of which this expansion deprived him, but rather characterizes it rather

generically as "illegal." Assuming that an expansion of its investigation would be illegal, however, it ran contrary not to constitutional guarantees but rather to the mandates of section 372(c)(5) and Rule 9(A) of the Fifth Circuit Complaint Rules. While this expansion was not in itself a due process violation, the Court has also determined above in Section B that the Special Committee did not exceed its statutory authority.

In this regard, only Judge McBryde's claim that he received inadequate notice of this expansion, along with the additional charges and witnesses it entailed, implicates constitutional guarantees of due process. While this Court is not bound by the Review Committee's determinations with respect to Judge McBryde's constitutional claims, the Court finds the Review Committee's analysis of this issue persuasive. Although the notice Judge McBryde received regarding the precise contours of the investigation as it expanded might ideally have included more detail, Judge McBryde was neither prejudiced in preparing for the hearing, nor deprived of the essential information he needed to do so. *See* Order of September 18, 1998 at 11 ("The letters sent by the special committee's counsel gave plain notice of the subject matter to be investigated."). In response to the new charges this expansion precipitated, Judge McBryde was afforded additional time to prepare. *See id.*

Inadequate notice also inspires Judge McBryde's complaint with respect to the Judicial Council's December 17, 1997 meeting and its December 31, 1997 Order. After being served with the Special Committee's 159-page final Report on December 4, Judge McBryde enjoyed less than two weeks to prepare his response thereto in time for the Judicial Council to consider it in advance of the meeting. *See* Pl.'s Mot. Summ. J. at 99. Nonetheless, and "[t]hrough great effort and expense," *id.* at 100, Judge McBryde managed to prepare several extensive responses. The Court cannot say that this interval, abbreviated as it may have seemed to Judge McBryde, deprived Judge McBryde of notice so as to violate his due process rights. Nor can the Court say that the period of time during which members of the Judicial Council considered his responses prior to their meeting, or the two weeks during which they reviewed additional responses from Judge McBryde before issuing their

December 31 Order, is so brief that it amounts to a "rush to judgment" by the Council in violation of constitutionally mandated due process. *Id.* at 99-101. As this Court remarked in the context of Judge McBryde's requests to conduct discovery on the process by which the Judicial Council reached its final decision, his "rush to judgment" theory is predicated on certain unsupported assumptions about the appropriate amount of time a decisionmaker should devote to arriving at its decision. *See* Memorandum Op. of Sept. 30, 1999 at 4. No constitutional rights are necessarily at stake in a purported deviation from his ideal standard.

Finally, an alleged due process violation animates Judge McBryde's claims that the Special Committee, and accordingly the Judicial Council, relied on hearsay and other impermissible evidence in making its findings of fact. Thus, Judge McBryde maintains, he remained unable to confront witnesses and evidence against him. *See id.* at 105. For example, the Special Committee's allusion to "the reluctance of witnesses to come forward and to testify in these proceedings because they fear reprisal," a reluctance that, in some cases, necessarily escaped documentation in the record, appears to present evidence which Judge McBryde was unable to confront. Still, the Court is persuaded that such evidence did not dictate nor even shape the Special Committee's ultimate findings, or the Judicial Council's decision. Instead, the Special Committee relied upon twenty discrete, and amply documented, incidents in rendering its determinations about Judge McBryde's intemperate and abusive behavior. Remarks such as the one quoted above may bolster the conclusion that Judge McBryde's conduct impacted the Fort Worth legal community in significant ways, but they are in no sense necessary to that conclusion; rather, the parade of witnesses and reams of documentary evidence fully demonstrate that Judge McBryde inspired fear and intimidation in many attorneys who appeared before him. Accordingly, the Court finds that the hearsay, gossip, and other forms of evidence that may have contributed to the Special Committee's findings remained so ancillary to the bulk of the evidence upon which the Special Committee relied as not to present any potential due process violation.

**b. Structural Defects**

Further, Judge McBryde contends that, by improperly conflating investigative and adjudicative functions, the Judicial Council violated his due process rights. He argues specifically that the deference which the Judicial Council granted to the Special Committee's findings and recommendations effectively transferred the adjudicative function from the former to the latter. As a consequence, the Special Committee operated not just as an investigative body, but as a "prosecutorial-investigative-adjudicative body." Pl.'s Opp. to United States' Mot. Dismiss at 15.[21] In addition, Judge McBryde maintains, four members of the Special Committee who participated in the investigation of the complaints against him subsequently participated in the Judicial Council's adjudication of those complaints. *See* Pl.'s Mem. Supp. Mot. Summ. J. at 114.

In the words of the Supreme Court, however,

> [t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative

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[21] Although both Defendant and Defendant-Intervenor understood Judge McBryde to be advancing a facial due process claim, alleging that the Act itself impermissibly sanctions a combination of investigative and adjudicative functions in members of the Judicial Council who also participated in the Special Committee's investigation, *see* United States Mem. Opp. Pl.'s Mot. Summ. J. at 9; Def.'s Mem. Supp. Mot. Dismiss or for Summ. J. at 41-42, Judge McBryde characterizes his claims otherwise. *See* Pl.'s Omnibus Reply to Opp. Mot. Summ. J. a 35. ("As Judge McBryde has previously explained, his due process claims are not a facial attack on the Act, but a complaint that the proceedings carried out against him denied him due process.") Rather, his claim targets another as-applied violation, in this case the improper overlap of these functions *contrary* to the intent of the Act. *See* Compl. ¶ 92c; Pl.'s Response to United States' Mot. Dismiss at 14 ("Indeed, it is [Judge McBryde's] position that the Act does not combine investigative and adjudicative functions. It intends that they be separate.")

> powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

*Withrow et al. v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). Similar claims "have been squarely rejected in prior decisions of [that] Court." *Id.* The *Withrow* plaintiff, a licensed physician whose practice consisted of performing abortions, faced suspension of his license by a state medical examining board which conducted its own investigation. *See id.* at 38-41, 95 S.Ct. 1456. He sought to enjoin the board from deciding the issue of suspension, arguing that such a combination of functions violated guarantees of due process, *see id.* at 42, 95 S.Ct. 1456, but the Supreme Court disagreed. Rejecting his challenge, the Court concluded that, absent specific evidence of bias, "the mere exposure to evidence presented in nonadversary investigative proceedings is insufficient ... to impugn the fairness of the Board members at a later adversary hearing." *Id.* at 55, 95 S.Ct. 1456.

Accordingly, while "we should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice...," *id.* at 54, 95 S.Ct. 1456, the dual service of Committee members as Council members, and the practice of deferring to the extensive, and painstaking, fact finding of the investigative body, "do not in themselves contain an unacceptable risk of bias." *Id.* In *Hastings v. Judicial Conf. of the United States,* 829 F.2d 91 (D.C.Cir.1987), *cert. denied,* 485 U.S. 1014, 108 S.Ct. 1487, 99 L.Ed.2d 715 (1988) ("*Hastings III*"), the District of Columbia Circuit considered precisely this question in the context of a facial attack on the Act. Quoting the Supreme Court's language in *Withrow,* the *Hastings III* Court held that no risk of bias emanating from the overlap of adjudicative and investigative functions inhered in the Act. *Id.* at 105. In the most eloquent and emphatic terms, the Court wrote:

> The fact that federal judges administer the mechanism described by the Act contributes in no small measure to this conclusion. They are called upon every day to put aside considerations not legally relevant to their decisions. A

> judge who can decide a case one way, notwithstanding inadmissible evidence of which he is aware indicating a different result, is not likely to prejudge a fellow judge's cause. If there is a risk here, it is the risk that an empathetic decision-maker poses to the public, not a risk of bias toward the judge against whom a complaint has been lodged.

*Id.* Indeed, Judge McBryde has adduced no evidence to suggest that this overlap of functions, either via the deference the Judicial Council may have accorded the Special Committee, or via the dual service of certain judges, operated here to deprive him of due process.

**c. Improper Motives**

While these structural aspects of the proceedings may not in themselves have deprived Judge McBryde of his constitutionally guaranteed due process, he also maintains that specific judges who served in investigative and adjudicative capacities harbored illegitimate motives against him. In particular, he contends that Chief Judge Politz's putative threat (warning him that his entire judicial career would be explored if he sought assistance from the Judicial Council in response to the *Satz* and *Torres* disputes, *see* Pl.'s 108(h) ¶ 16) heralded a process motivated by vengeance and bias. According to Judge McBryde, several of the judges involved in the investigation endeavored to retaliate against him both for his refusal to undergo a psychiatric evaluation, and for his ultimate triumph in persuading the Fifth Circuit to vacate Chief Judge Buchmeyer's reassignment orders. *See generally* Pl.'s Mot. Summ. J. at 108-14.

Judge McBryde raised these contentions both before the Judicial Council and before the Review Committee. He moved for the recusal of several judges from the Special Committee and the Judicial Council; the final such motion occurred before the December 17, 1998 meeting of the Judicial Council. There the named judges declined to recuse, but subsequently withdrew from the meeting while the remaining members discussed and reviewed the motion. In the absence of their fellow judges, the remaining members of the Judicial Council denied Judge McBryde's motion for recusal of the judges he identified. *See* Def.'s Mot. to Dismiss or for Summ. J. at 60-61. As Defendants

have persuasively characterized Judge McBryde's ongoing claim of bias following this practice,

> the unstated but necessary predicate for Judge McBryde's position is that all fourteen members of the Judicial Council not accused by Judge McBryde of bias and all five members of the Review Committee (each an Article III judge even if serving in an administrative capacity) were either 'tainted' or so 'cowed' by the 'biased' judges as to have been unable to think or to act independently on the basis of the record.

Def.'s Opp. to Pl.'s Mot. Summ. J. at 26. The Court finds such a position utterly implausible. Cases in which "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally desirable" include "those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him." *Withrow,* 421 U.S. at 47, 95 S.Ct. 1456 (citations omitted). Judge McBryde has presented no such circumstances to impute bias to these or other participants in the challenged process. Instead, he offers mere conclusory allegations of bias and vindictiveness that are effectively barred under *Withrow. See id.*

**D. Judge McBryde's First Amendment Claim.**

Finally, Judge McBryde has alleged that the Act's confidentiality clause violates the First Amendment, both facially and as it has been applied to him. Section 372(c)(14) provides in relevant part that

> all papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding except to the extent that--
>
> > (C) such disclosure is authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

28 U.S.C. § 372(c)(14). Since the issuance of the Review Committee's Order, Judge McBryde has sought to make public the entire record of these proceedings. In his view, the imperatives of confidentiality that have protected this record

from disclosure have "precluded him from defending himself in public against the accusations made by the Council and the Review Committee ...." Pl.'s 108(h) ¶ 199.

**1. Events Relating to this Claim**

When Judge McBryde filed his complaint in this Court, he had, per section 372(c)(14), tendered requests to both Chief Judge Politz and Judge Bauer to release the record in full. Both judges refused to accede to what they characterized as Judge McBryde's "all or nothing" request. *See* Defs.' letter to C.J. Rehnquist, Nov. 23, 1998 at 3 (Pl.'s Ex. 185). Both judges were willing to release a majority of the record with certain exceptions, including the psychiatric materials and witness identities. Judge McBryde had not yet availed himself of the third option which the statute provides for such a situation: petitioning Chief Justice William Rehnquist. Judge McBryde feared that to involve Chief Justice Rehnquist risked the possibility that, should his response become a subject of this lawsuit, the Chief Justice would be obliged to recuse himself from any consideration that the Supreme Court might later afford this case. *See* Compl. ¶ 97.

Since the filing of this case, the contours of Judge McBryde's First Amendment claim have shifted significantly. In November of 1998, Judge McBryde did petition the Chief Justice, via letter, to permit him to disclose the entire record. While the parties awaited a response from Chief Justice Rehnquist, both Defendants and the United States maintained that Judge McBryde's First Amendment claim was not yet ripe for adjudication in this Court; after all, it remained possible that the Chief Justice would endorse his view that full disclosure of all the proceedings was now warranted. Accordingly, by agreement with the parties, the Court entered a protective order requiring the parties to redact their public filings in accordance with section 372(c)(14), and stipulated that the record would be unsealed if Judge McBryde obtained the requisite authorization, or if he prevailed on his First Amendment claim. Thus when Judge McBryde filed with this Court all the documents relating to the section 372(c) proceedings, the Court placed these under seal as well.

On June 11, 1999, the same day that the Court had scheduled oral argument on the dispositive motions in this case, Judge McBryde filed an additional motion to unseal the entire record along with a declaration from his attorney testifying to the hardship which the confidentiality requirement imposed on him and his client. *See* Pl.'s Mot. to Unseal Documents; Broiles Decl. ¶ 6. While earlier Judge McBryde had adduced arguments relating to the facial invalidity of the confidentiality provision, and the extent to which its application in his case had prevented him from engaging in the full and open discussions to which he aspired, his motion to unseal undertook a new line of analysis. There he argued that, both facially and as applied to him, section 372(c)(14) constituted a prior restraint on his ability to speak freely. *See* Pl.'s Mot. to Unseal Documents at 2-3 (citing, *inter alia, City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988); *Kamasinski v. Jud. Rev. Council,* 44 F.3d 106, 112 (2d Cir.1994)). Three days later, before the Court had the opportunity to consider Judge McBryde's latest motion, Chief Justice Rehnquist replied to Judge McBryde's request authorizing disclosure of all portions of the record save "the identity of the witnesses in the proceedings." C.J. Rehnquist letter of June 11, 1999 (Pl.'s Ex. 189). As justification for this remaining prohibition on disclosure, the Chief Justice cited Rule 15(G) of the Fifth Circuit Complaints Rules: "In any disclosure, the chief judge may for good cause require the shielding of identity of the complainant, or of any witnesses in an investigation conducted by special committee or the judicial council or in a limited inquiry conducted by the chief judge." Fifth Cir. Compl Rules 15(G). In the Chief Justice's words, "[t]he rule is designed in part to encourage potential complainants and witnesses to participate in judicial misconduct cases, and its application in this proceeding appears reasonable and should not prejudice any substantive arguments [Judge McBryde] may make about the record." C.J. Rehnquist letter at 1.

When filing this letter with the Court, Judge McBryde indicated in an attached affidavit that the Chief Justice's authorization did permit him to make some of the disclosures he

"considered essential to be made for the public to have an understanding of the nature of the proceedings that were conducted against [him] and the magnitude of the improprieties in which participants in the proceedings have engaged ...." Nonetheless, he felt that, *pace* Rehnquist's assurance to the contrary, the remaining ban against disclosing witnesses' identities significantly prejudiced his ability to discuss, fully and frankly, the "nature of the proceedings" to which he had been subjected. *See* June 16, 1999 McBryde Decl. at 2-3. This Court ultimately denied Judge McBryde's motion to unseal on the grounds that the sealed portions of the record are riddled with references to the identity of the witnesses, and it was therefore impossible to unseal those portions of the record that were filed under seal without violating the terms of the Chief Justice's limited authorization. *See* Amended Protective Order, filed Sept. 30, 1999.

Chief Justice Rehnquist's qualification with respect to "the identity of the witnesses in the proceedings" has occasioned some confusion among the parties. This reference to "the identity of the witnesses" leaves uncertain the scope of the precise information protected from disclosure. For instance, Judge McBryde contends that "virtually every one of the fifty-five witnesses to which the Chief Justice referred could be identified by the testimony he or she gave even if the names were deleted." Pl.'s Reply to Defs.' Supp. Response at 4- 5. He points out that efforts to safeguard witnesses' names will necessarily confront the extent to which other contextual information relating to these witnesses will lead ineluctably to the discovery of their identities. Defendants, however, have maintained that "if Judge McBryde wishes to disclose the record, he must redact the *names* of witnesses ...." Defs.' Mem. in Response to Pl.'s Mot. Unseal at 4 (emphasis added). The Court resolved this ambiguity by determining, in its Amended Protective Order, that Chief Justice Rehnquist's letter prohibits disclosure only of the names of the witnesses in the section 372(c) proceedings. *See* Amended Protective Order at 3. More recently, the Court also ordered that the parties respond more directly to Judge McBryde's arguments in light of the new status

quo following the Chief Justice's limited authorization. *See* Order of Nov. 18, 1999.

**2. Judge McBryde's Argument.**

According to Judge McBryde, the ambiguity surrounding the scope of the Chief Justice's prohibition exemplifies the unconstitutionality of section 372(c)(14). This provision, he contends, granted three government officials, and ultimately the Chief Justice, unbridled discretion to decide whether and within what content-based parameters Judge McBryde may speak.[22] *See* Pl.'s Omnibus Reply to Defs.' and United States' Opp. to Mot. to Unseal at 8- 9. It is, he claims, "a classic prior restraint disguised as a licensing scheme; that is, before he may speak on core political issues, Judge McBryde first has to ask permission from Judges Politz and Bauer and Chief Justice Rehnquist." *Id.* at 9. Judge McBryde has taken the position that the statute operates facially as an impermissible prior restraint because it provides that all "papers, documents, and records" relating to section 372(c) proceedings "shall not be disclosed by any person ... except to the extent that ... such disclosure is authorized" by the subject judge and one of three other government officials. 28 U.S.C. § 372(c)(14); *see* Pl.'s Omnibus Reply to Court--Ordered Responses at 4. In other words, he maintains, the statute sets up a kind of suspect licensing scheme wherein the ability to engage in core political speech is contingent upon the permission of government officials, without offering any guidelines or standards by which those officials' discretion may be curtailed. *See id.* Moreover, he asserts that the statute has been applied to Judge McBryde as an unconstitutional prior restraint, preventing him from speaking freely per Chief Justice Rehnquist's ongoing interdiction against full disclosure of the record and its seemingly uncertain scope. *See id.* at 9-10.

**3. Viewing Judge McBryde's Claim in Light of First Amendment Doctrine**

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[22]Specifically, he argues that "[t]his unbridled discretion-- which here was exercised on the basis of content--that § 372(c)(14) grants to the Chief Justice is precisely what makes the provision unconstitutional on its face." *Id.* at 8-9.

Speech on public issues, particularly the conduct and performance of government officials, occupies "the highest rung of the hierarchy of First Amendment values ...." *Carey v. Brown,* 447 U.S. 455, 467, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1979). In *Mills v. Alabama,* 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484, the Supreme Court announced that, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Id.* at 218, 86 S.Ct. 1434; see also *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (exhorting that "debate on public issues should be uninhibited, robust, and wide-open"). It is beyond peradventure, then, that complaints about the judicial behavior of a federal judge, a government official endowed with life tenure absent extraordinary circumstances, rest at the center of the kind of expression the First Amendment must protect. *Cf. Landmark Communications,* 435 U.S. at 839, 98 S.Ct. 1535; *First Amendment Coalition v. Jud. Inquiry and Rev. Bd.,* 784 F.2d 467, 473 (3d Cir.1986) (both discussing the significance of public debate about the conduct of the judiciary in the context of reviewing state judicial misconduct hearings). Surely this protection extends not only to the complainants and other interested parties, but also to the judges themselves to marshal their own explanation or defense.

Indeed, any provision that restricts speech on the basis of its content must undergo "the most exacting scrutiny." *Boos v. Barry,* 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). To withstand such scrutiny, the provision in question must be both "necessary to serve a compelling state interest and narrowly drawn to achieve that end." *Id.; see also Carey v. Brown,* 447 U.S. 455, 461, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). Nonetheless, even "core" protected speech is not immune from government regulation. Early in this century, Justice Brandeis wrote:

> The right to free speech, the right to teach and the right of assembly are, of course, fundamental rights. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their

> nature absolute. Their exercise is subject to restriction, if the particular restriction is required in order to protect the State from destruction or serious injury, political, economic or moral.

*Whitney v. California,* 274 U.S. 357, 373, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). Accordingly, courts have permitted limited regulation of speech through permissible time, place, or manner restrictions, *see United States v. Grace,* 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983), and in cases where the state interest is so weighty, and the regulation so narrowly tailored, that it prevails despite the public interest in unfettered expression.

Still, the burden such a regulation must overcome is most onerous when it constitutes a prior restraint on speech. *See Smith, et al. v. Daily Mail Publishing Co., et al.,* 443 U.S. 97, 102, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979) (according prior restraints on speech "the most exacting scrutiny"). Whereas threats of subsequent penalties, whether criminal or civil damages, may well operate to "chill" speech, "a prior restraint freezes speech before the audience has the opportunity to hear the message." *In the Matter of Providence Journal Co.,* 820 F.2d 1342, 1345-46 (1st Cir.1986). Thus, prior restraints pose an even more immediate menace than do other kinds of regulations. Justice Douglas, for example, issued the following caveat: "For if a person must pursue his judicial remedy [of lifting an injunction] before he may speak, parade, or assemble, the occasion when protest is desired or needed will have become history and any later speech, parade, or assembly will be fruitless or pointless." *Walker v. City of Birmingham,* 388 U.S. 307, 336, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967) (Douglas, J., dissenting).

The Court is persuaded that section 372(c)(14), as it has been applied to Judge McBryde, operates as a prior restraint.[23] From September 1998, when the Review Committee issued its

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[23]Because the Court finds that the confidentiality provision has functioned as an unconstitutional prior restraint in its application to Judge McBrdye, it need not reach the issue of whether or not section 372(c)(14) itself is facially unconstitutional.

Order and Memorandum Opinion, to June 1999, when Chief Justice Rehnquist authorized the limited disclosure of the record of the proceedings, Judge McBryde was precluded from speaking freely and openly about the process that led to his public reprimand, his recusal from certain cases, and the suspension of all new cases for one year. Judge McBryde essentially petitioned Judges Politz and Bauer for a license to disclose all aspects of the proceedings which he felt were relevant to his defense or deserving of censure. However, those two of the three government officials authorized by the Act to provide such permission declined to disclose all matters, including the identity of witnesses. Then, in June 1999, Chief Justice Rehnquist responded to Judge McBryde's entreaty by authorizing what Judge McBryde sees as a partial, and inadequate, disclosure. *See* McBryde Decl. of June 16, 1999 at 3-7. Thus, the current application of the confidentiality provision to Judge McBryde continues to act as a restraint on his speech, a restraint that targets particular content (the identities of the witnesses) which Judge McBryde deems essential to his defense.

Nonetheless, we recall that "[f]reedom of speech ... does not comprehend the right to speak on any subject at any time." *American Communications Ass'n v. Douds,* 339 U.S. 382, 394-95, 70 S.Ct. 674, 94 L.Ed. 925 (1950). For example, the Supreme Court has upheld restrictions on speech in the context of civil discovery, leaving intact a protective order that prohibited dissemination of information which one party learned about the other during pretrial discovery. *See Seattle Times Company v. Rhinehart et al.,* 467 U.S. 20, 37, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). Notwithstanding Defendants' and Intervenor-Defendants' arguments to the contrary, however, *Seattle Times* is inapposite to the case at bar. There the Court emphasized that, "[i]n sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context." *Id.* at 34, 104 S.Ct. 2199. Unlike such a protective order, appropriate to the "unique character of the discovery process," *id.* at 36, 104 S.Ct. 2199,

the operative restriction on Judge McBryde's speech applies to the adversarial proceedings that ultimately engendered very public consequences. These consequences include not only a public reprimand and publicly known sanctions, but also, via the internet, the publication of the December 31 Order on the Fifth Circuit's official web site, along with the names of the 23 lawyers, and presumably witnesses, before whose cases Judge McBryde is to recuse himself. *See* http://www.ca5.uscourts.gov/mcbryde/mcbryde.htm (containing links to both the December 31 Order and the September 28 Memorandum and Order). To justify the restriction at issue here, a prior restraint on Judge McBryde's speech, the state interests warranting it must be sufficiently pressing.

When examining these interests, the Court notes that all fifty states and the District of Columbia have created some body or commission with its own set of procedural rules to monitor and review judicial conduct. Each and every jurisdiction provides some degree of confidentiality protection to guard the judicial disciplinary process, although these provisions vary in the duration of their application and the scope of their reach. *See* Bryan Keyt, *Reconciling the Need for Confidentiality in Judicial Disciplinary Proceedings with the First Amendment,* 7 Geo J. Legal Ethics 959, 961 & nn. 18- 20 (1994) (listing each constitutional or statutory provision mandating confidentiality, organized by the stage at which this protection ceases). In no jurisdiction, however, does the mandate of confidentiality continue in perpetuity. *See id.*

Several federal courts, including the Supreme Court, have considered these provisions in the context of state judicial disciplinary proceedings. The *Landmark* Court addressed the narrow question of "whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the [Virginia] Judicial Inquiry and Review Commission." *Landmark Communications,* 435 U.S. at 837, 98 S.Ct. 1535. Appellant, a newspaper, challenged its conviction for publishing an article that discussed proceedings before the Commission while those proceedings were pending. Assuming without deciding that

judicial independence and protecting judges' reputations were legitimate and significant state interests, the Court nonetheless found that the provision ran afoul of the First Amendment.

> Admittedly, the Commonwealth has an interest in protecting the good repute of its judges, like that of all other public officials. Our prior cases have firmly established, however, that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.' The remaining interest sought to be protected, the institutional reputation of the courts, is entitled to no greater weight in the constitutional scales.

*Id.* at 841-42, 98 S.Ct. 1535 (quoting *New York Times v. Sullivan,* 376 U.S. at 272-73, 84 S.Ct. 710; also citing *Garrison v. Louisiana,* 379 U.S. 64, 67, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964)). Accordingly, the Court held that criminal prosecution of a third party who publishes truthful information regarding such proceedings was impermissible under the First Amendment. *Id.* at 845-46, 98 S.Ct. 1535.

Following that case, Virginia amended the relevant portion of the statute to apply only to *participants* in Commission proceedings. *See Baugh et al. v. Judicial Inquiry & Rev. Com'n,* 907 F.2d 440, 443 (4th Cir.1990). In a later case, attorneys who had filed complaints about state judges with the Commission challenged the constitutionality of the remaining confidentiality provision. *See id.* The Fourth Circuit found that the portion applying to complainants who wished to disclose the fact and outcome of their complaints deserved the most exacting scrutiny. *Id.* at 444 (citing *Boos,* 485 U.S. at 321, 108 S.Ct. 1157.). It thus reversed the district court's dismissal of the challenge, which was predicated on a more lenient standard of review. *Cf. Kamasinski,* 44 F.3d at 110-11(upholding the confidentiality provisions of a Connecticut statute that maintained the confidentiality of judicial discipline proceedings unless the Judicial Review Council found probable cause to determine that judicial misconduct had occurred); *First Amendment Coalition,* 784 F.2d at 468 (upholding the constitutionality of a similar Pennsylvania statute permitting public access to the records of its judicial review board only if the board recommends imposing discipline, but holding the

board's order banning witnesses from disclosing their own testimony overbroad). The Court emphasizes that in none of these cases did the challenged statute require confidentiality once the proceedings had reached their conclusion and the subject judge had been censured. In fact, the *Kamasinski* court noted specifically that "[o]nce the JRC [Judicial Review Council] has determined whether or not there is probable cause that judicial misconduct has occurred, even Connecticut's most compelling interests cannot justify a ban on the public disclosure of allegations of judicial misconduct." *Id.* at 112.

In a somewhat analogous context, the Supreme Court held unconstitutional a Florida statute prohibiting a grand jury witness from revealing the substance of his or her testimony, even after the proceedings had concluded. *See Butterworth v. Smith,* 494 U.S. 624, 626, 110 S.Ct. 1376, 108 L.Ed.2d 572 (1990) (Rehnquist, C.J.). Asserting that the state interests in preserving grand jury secrecy did not "warrant a permanent ban on the disclosure by a witness of his own testimony once a grand jury has been discharged ...," the Court reasoned that these interests (*e.g.,* the need to keep information from the target of the investigation, the need to prevent the importuning of grand jurors) became obviated once the grand jury adjourned. *Id.* at 632-33, 110 S.Ct. 1376.

A certain irony characterizes Judge McBryde's First Amendment claim before this Court. In every other case known to this Court involving judicial disciplinary proceedings, challenges to the confidentiality provision have issued from a complainant, witness, or third party. That person's right to speak about the proceedings had to be balanced against the state's legitimate interest in protecting the judge and the judiciary as an institution. Here, however, the subject judge himself maintains that to vindicate his reputation, he must be permitted to speak openly about the very proceedings that impugned him. Such a case would seem unusual, to say the least, possibly contemplated neither by individual courts nor by any legislature. Still, upon review of Judge McBryde's claim, this Court cannot disregard or diminish a judge's interest in vindicating his reputation, and in announcing his perspective on the

proceedings to all who will listen. Indeed, this interest surely deserves the most heightened First Amendment protection.

Moreover, while the confidentiality provision in the Act and its state counterparts serves a variety of legitimate state interests--protecting the judge from spurious criticism, the judiciary as an institution from disrepute, and witnesses and complainants from unwanted publicity--the paramount interest is that of the subject judge.[24] Publication of frivolous and unfounded complaints threatens to impugn, and even destroy, a judge's reputation even when an investigation ultimately acquits him or her. According to Judge McBryde, the Defendants' silence in their November 23, 1998 letter to the Chief Justice on the issue of protecting witnesses' identities from disclosure is "tantamount to an admission by defendants that there is no compelling state interest for denial of disclosure of the identities of the witnesses in the proceedings." Pl.'s Omnibus Reply to Opp. to Mot. Unseal at 22. The Court does not go so far as to endorse this view, but rather understands the Chief Justice, citing the Fifth Circuit Rules, to have articulated a legitimate concern for witness privacy and the necessity of encouraging witnesses to come forward with complaints in other instances. In his response to Judge McBryde, the Chief Justice was acting strictly in an administrative capacity, carrying out the function delineated by the statute; he was neither reviewing nor issuing a ruling on the constitutionality of the provision. Nonetheless, the Court finds that, at the point where the proceedings have

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[24]In its report recommending passage of the Act, the Senate Judiciary Committee identified the principal interests served by the confidentiality provision: "The Committee believes that the establishment of a confidentiality provision will avoid possible premature injury to the reputation of a judge." 1980 U.S.C.C.A.N. 4215, 4330. Indeed in the version of the statute under consideration by the Committee, the confidentiality provision articulated three exceptions to its application: (1) an authorized written waiver by the subject judge; (2) issuance of a public censure or reprimand; or (3) a final adverse action taken against the judge, not including an order of dismissal. *See id.* Each of these exceptions presumes one thing: that the primary interest at stake resides in the reputation of the judge. In the first exception, this interest has been waived; in the second and third, the interest is obviated by the results of the proceedings.

long since concluded and Judge McBryde has undergone a public reprimand and sanctions, this interest loses much of its significance. In addition, as Judge McBryde points out, the names of many of the witnesses have already reached the public domain, through the internet or through newspaper accounts of the proceedings. Other witnesses are easily identified through contextual information which Judge McBryde is permitted to disclose, in accordance with the Court's narrow interpretation of the Chief Justice's letter. At this stage, the interest of protecting witnesses' names cannot possibly justify the imposition of a prior restraint on Judge McBryde's ability to discuss and to challenge publicly the proceedings that resulted in his censure.

In sum, the Court finds that section 372(c)(14), as it has been applied to Judge McBryde, operates as an unconstitutional prior restraint on his ability to speak. The interest in shielding witnesses from publicity and encouraging complainants to come forward in the future, while legitimate, is insufficient to justify the restriction on Judge McBryde's open and frank discussion of the proceedings once they have concluded and sanctions have been imposed.

## III. CONCLUSION

For the reasons stated above, judgment shall be entered for Defendants and the United States on all claims save Judge McBryde's First Amendment claim. The Court shall enter judgment for Judge McBryde on his claim that the confidentiality clause, as it has been applied to him, violates the First Amendment.

An order accompanies this memorandum opinion.

December 30, 1999

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF COLUMBIA

No. 98-2457 (CKK)

HON. JOHN H. MCBRYDE,
Plaintiff,
v.
COMMITTEE TO REVIEW CIRCUIT
COUNCIL CONDUCT AND DISABILITY
ORDERS OF THE JUDICIAL
CONFERENCE OF THE UNITED STATES,
HON. WILLIAM J. BAUER, THE
JUDICIAL COUNCIL OF THE FIFTH
JUDICIAL CIRCUIT, HON. HENRY A. POLITZ,
Defendants,
and
THE UNITED STATES OF AMERICA,
Intervenor-Defendant.

**ORDER**

For the reasons expressed in the accompanying Memorandum Opinion it is, this 30 day of December, 1999, hereby

**ORDERED** that Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment [# 45] is GRANTED as to all of Judge McBryde's claims with the exception of his First Amendment claim; and it is further

**ORDERED** that Intervenor-Defendant's Motion to Dismiss [# 50] is GRANTED as to all of Judge McBryde's claims with the exception of his First Amendment claim; and it is further

**ORDERED** that Plaintiff Judge McBryde's Motion for Summary Judgment [# 51] is DENIED as to all claims, EXCEPT that the Motion is GRANTED for Plaintiff as to his claim that the Act has been applied to him in a manner that violates the First Amendment; and it is further

**ORDERED** that entry of judgment on Plaintiff's First Amendment claim is STAYED until January 7, 2000, so that defendants, should they wish to do so, may seek an additional

stay from the United States Court of Appeals pending any appeal; that all sealing orders shall remain in effect during this period of the stay.

**SO ORDERED.**

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

## APPENDIX C

## BEFORE THE COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS JUDICIAL CONFERENCE OF THE UNITED STATES

No. 98-372-001

In re: Complaints of Judicial Misconduct or Disability

COMMITTEE MEMORANDUM AND ORDER

This matter is before the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders pursuant to petitions for review received on March 16, 1998.[1]

Background

We will not attempt to recite in detail here all the long history of these proceedings. We merely summarize below some major aspects of that history that we deem especially relevant to our memorandum and order. In addition, we will not discuss the specifics of the factual underpinnings of the charges against the named judge and the judicial council's findings thereon. The judicial council has determined that, at least at the present time,

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[1]Under 28 U.S.C. § 372(c)(10), "A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection [-- the paragraph under which the judicial council may take action on, or may dismiss, a complaint of judicial misconduct or disability following the report of a special investigating committee --] may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph."

Section 331 of 28 U.S.C. provides, "The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee."

The Judicial Conference has established this committee to be the standing committee authorized to act for the Judicial Conference under § 331 in proceedings of this kind. Pursuant to §§ 331 and 372(c)(10), this committee may grant or deny complainant's petitions for review, and the committee's orders in this respect are final and not appealable.

these matters should remain confidential, and we defer to that determination.

On July 5, 1995, an attorney filed a complaint against United States District Judge John McBryde of the Northern District of Texas under section 372(c) alleging that the judge's conduct during a trial had been "obstructive, abusive and hostile." On September 13, 1995, Chief Judge Henry Politz of the Fifth Circuit appointed a special committee, consisting of himself and four other judges, to investigate the allegations of this complaint. He also identified as a complaint a letter he had received criticizing Judge McBryde's conduct in another case, and referred this identified complaint to the special committee for investigation. Subsequently, by orders dated January 31, 1996, and March 19, 1996, Chief Judge Politz identified as complaints three additional complaints or letters he had received objecting to Judge McBryde's conduct in these or other cases, and referred all three complaints to the special committee.

The special committee originally scheduled evidentiary hearings on these allegations to commence on May 19, 1997. On May 5, 1997, special committee counsel notified counsel for Judge McBryde of the witnesses the special committee intended to present, and stated that the special committee might add to the record transcripts and court decisions from thirteen cases handled by Judge McBryde that had not been the subject of any complaint. After the judge moved to strike these latter exhibits or, in the alternative, to continue the hearings, the special committee continued the hearings until August 25, 1997.

The special committee counsel on July 25, 1997, sent counsel for Judge McBryde a letter notifying the judge of a number of matters the investigation would be expanded to include, listed under the headings "conduct involving lawyers" and "conduct involving other judges." Each matter was accompanied by a paragraph of explanation.

Later, on August 20, 1997, the special committee's counsel faxed Judge McBryde's counsel a letter adding three additional witnesses, with a brief explanation of the subject matter about which each would testify. The letter added that the special committee's counsel might present evidence concerning the

judge's unspecified conduct in another named case. After Judge McBryde protested that he needed more time to prepare to defend himself against all these additional allegations, further hearings were scheduled for September 29, 1997.

The special committee conducted evidentiary hearings from August 25, 1997, through August 29, 1997. On September 17, 1997, the special committee's counsel sent counsel for Judge McBryde a letter listing the four witnesses he intended to call at the resumed September 29 hearings, and setting forth the projected subject matter of the testimony of each. The hearings then resumed and concluded from September 29, 1997 through October 2, 1997.

The special committee submitted its report to the judicial council on December 4, 1997. The judicial council met to consider the report on December 17, 1997, and issued its Order and Public Reprimand on December 31, 1997.

The judicial council's Order and Public Reprimand ordered sanctions against Judge McBryde: (1) under 28 U.S.C. § 372(c)(6)(B)(vi), a public reprimand; (2) under 28 U.S.C. § 372(c)(6)(B)(iv), an order that no new cases be assigned to Judge McBryde for a period of one year; and (3) under 28 U.S.C. § 372(c)(6)(B)(vii), an order that Judge McBryde not participate for a period of three years in certain defined cases involving certain listed attorneys. The Order and Public Reprimand states, in part, as follows:

> "To the extent relevant to the action taken below, the Council adopts by a clear majority vote the Special Committee's Report, Findings of Fact, and Recommendations. Based thereon:
>
> "1. The Council hereby PUBLICLY REPRIMANDS Judge McBryde, pursuant to 28 U.S.C. § 372(c)(6)(B)(vi), for conduct prejudicial to the effective and expeditious administration of the business of the courts within the Circuit and inconsistent with Canon 2(A) and Canon 3(A)(3) of the Code of Conduct for United States Judges.
>
> "Judge McBryde has engaged in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and discord within, the federal

judiciary. This conduct is unacceptable and damaging to the federal judiciary.

"Judge McBryde's intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others has detrimentally affected the effective administration of justice and the business of the courts in the Northern District of Texas. Judge McBryde has abused judicial power, imposed unwarranted sanctions on lawyers, and repeatedly and unjustifiably attacked individual lawyers and groups of lawyers and court personnel. This pattern of behavior has had a negative and chilling impact on the Fort Worth legal community and has, among other things, prevented lawyers and parties from conducting judicial proceedings in a manner consistent with the norms and aspirations of our system and is harmful to the reputation of the courts.

"2. Pursuant to 28 U.S.C. § 372(c)(6)(B)(iv), no new cases are to be assigned to Judge McBryde for a period of one (1) year from the effective date of this Order; and

"3. Pursuant to 28 U.S.C. § 372(c)(6)(B)(vii), Judge McBryde, for a period of three (3) years from the effective date of this Order, is not to participate in (i) cases now pending before him (other than any as to which there are appellate proceedings) in which any of the attorneys listed on Attachment A are currently involved, and (ii) any and all cases filed after the effective date of this order in which the initial notice of appearance includes any of the attorneys listed on Attachment A."

The judicial council stayed implementation of its Order and Public Reprimand for thirty days so that Judge McBryde could appeal to, and seek to obtain an additional stay from, this committee. The council further directed that its Order and Public Reprimand would remain sealed during the period of any stay.

On motion by Judge McBryde, this committee issued an order on February 6, 1998 (modifying this committee's prior order of January 29, 1998), staying the judicial council's Order and Public Reprimand, with the exception of paragraph 3 thereof, on the condition that Judge McBryde file his intended petition for review of the judicial council's actions on or before

March 16, 1998. This committee permitted paragraph 3, the directive that Judge McBryde not participate for a period of three years in certain defined cases involving certain listed attorneys, to take effect as of the February 6, 1998 date of this committee's order.

On March 16, 1998, Judge McBryde filed seven petitions for review of the judicial council's actions: five petitions for review of the judicial council's handling of each of the five complaints filed or identified against Judge McBryde; a petition for review of the judicial council's decision not to disqualify certain of its members from participating in its consideration of the special committee's report; and an omnibus petition for review treating all other aspects of the challenged actions of the judicial council. After this committee granted the judicial council's request to file a response to Judge McBryde's petitions, the council filed such a response on April 16, 1998. Subsequently Judge McBryde filed a reply to the judicial council's response and a supplemental memorandum, and the judicial council filed a response to the supplemental memorandum.

We now turn to our consideration of the petitions for review.

The Committee's Standard of Review

Judge McBryde and the judicial council dispute the standard of review that should be applied by this committee to a judicial council's findings of fact and to the judgments made by a judicial council in assessing the appropriateness of particular sanctions under the circumstances. According to the judge, the committee should undertake a searching, de novo review of all of the judicial council's determinations. The council responds "that at a minimum, substantial deference should be accorded its factual findings and that something approaching an abuse of discretion standard should apply to the remedies adopted in the December 31 Order. . . . The Review Committee [should] take into account the extensive efforts undertaken in developing, evaluating, and acting upon the record in this matter."[2]

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[2]There is no dispute between Judge McBryde and the judicial council that the committee, like a court of appeals, will review determinations of law de novo.

In its past decisions on petitions for review, this committee has never precisely articulated its standards for reviewing orders issued by circuit judicial councils under 28 U.S.C. § 372(c). The committee did, in no. 92-372-001 (1992), uphold a judicial council order because there was "substantial evidence in the record to support the Judicial Council's factual findings." This statement certainly makes clear that the committee was not reviewing the council's factual findings de novo.

A fair reading of the committee's past rulings suggests that the committee has not in the past applied either a de novo standard or an abuse-of-discretion standard in reviewing judicial council remedies, but something in between. The committee's most substantial assay at delineating a standard of review occurred in no. 87-372-001 (1987), in which the Tenth Circuit Judicial Council had split by a 3-3 vote on whether to accept the recommendation of the special committee that the judge be reprimanded. The committee stated as follows:

> "[H]ow much weight should be given to recommendations of the Special Committee, and how the committee should apply the standard of conduct set out in the statute against the record developed by the Special Committee and the Judicial Council is not altogether clear. The Special Committee is provided for by statute. Its duties are designated by statute. It is directed by statute to make findings and recommendations for appropriate action by the Judicial Council. Clearly, the report and recommendation of the Special Committee is entitled to be considered by the Council and this Review Committee and to be given such weight as the Judicial Council or this committee deems appropriate.
>
> "It is also clear that the Judicial Council and by virtue of the granting of a petition for review, this committee is free to accept or reject the recommendations of the Special Committee based on their perception of whether the record indicates that the conduct was prejudicial to the effective and expeditious administration of the business of the courts and to take any action whether or not recommended by the Special Committee to assure the effective and expeditious administration of the business of the courts. However, a fair

reading of the statute also leads to the conclusion that the recommendations of the Special Committee are not to be regarded lightly.

. . .

". . . The committee finds that the recommendation of the Special Committee is supported by a reasonable and responsible reading of the record."

In no. 87-372-001 this committee was not addressing the degree of deference to be accorded findings and conclusions of a judicial council, but rather the weight to be given a special committee recommendation in a situation where the council vote had been deadlocked. This committee accorded the special committee's recommendation substantial deference. Presumably judicial council findings and conclusions, arrived at following consideration of the report of a special committee, should be accorded at least as much deference as mere special committee recommendations. Thus, no. 87-372-001 provides precedent for this committee to apply a standard of substantial deference to the judicial council's findings and choice of remedies, if not an abuse of discretion standard.

The statute contains nothing that is suggestive of any particular standard of review. The Judicial Conference Rules for the Processing of Petitions for Review do state, in Rule 13, "In recognition of the review nature of petition proceedings under 28 U.S.C. § 372(c)(10), no additional investigation shall ordinarily be undertaken by the Judicial Conference or the Committee. If such investigation is deemed necessary, the Conference or Committee may remand the matter to the circuit judicial council that considered the complaint, or may undertake any investigation found to be required."

As a practical matter, de novo review of factual findings would require, at least sometimes, that this committee conduct further investigation to see and hear the testifying witnesses itself. The policy of the Conference rules that additional investigation shall not ordinarily be undertaken, and when undertaken can be done by the judicial council on remand, further strongly suggests that the rules presuppose a standard of review of factual findings more deferential than the de novo standard urged by Judge McBryde. If ordinarily it is the special

committee that actually sees and hears the witnesses, for the traditional reasons it would make little sense, and would be highly unusual, for this committee to review de novo fact findings of the special committee adopted by the judicial council.

The committee concludes, therefore, that an intermediate standard -- "substantial deference"-- should be applied to the judicial council's factual findings. The committee will accord the degree of deference the committee deems proper given the underpinnings of the particular factual determination. For example, a factual determination based on live testimony, or on inferences deriving from the circuit council's first hand knowledge of local personalities or circumstances, may therefore be accorded greater deference than a factual determination based solely on written materials equally available to the committee.

The committee will also apply a similar standard of "substantial deference" in the committee's review of the judicial council's remedies. De novo review of judicial council remedies, as urged by the named judge, would be inappropriate because it would fail to take any account of the familiarity of the judicial council members, on the spot, with the personalities and circumstances surrounding the allegations against the disciplined judge. A de novo standard would tend to undercut some of the very reasons why, under the current decentralized system of judicial discipline, disciplinary authority is primarily conferred upon local judges.

Procedural Issues

The special committee's expansion of the investigation. Judge McBryde points out that, for the most part, the judicial council's sanctions against him are not grounded upon any of the specific incidents alleged in the five complaints that were originally filed or identified against him. Instead, the lion's share of the special committee's findings adverse to Judge McBryde concerned matters not raised in those complaints that were reached as a result of the special committee's expansion of its investigation pursuant to Rule 9(A) of the Rules Governing Complaints of Judicial Misconduct or Disability adopted by the Judicial Council of the Fifth Circuit.

Rule 9(A) states as follows:

> "Each special committee will determine the extent of the investigation and the methods to be used. If the committee concludes that the judge may have engaged in misconduct beyond the scope of the complaint, it may expand that scope to encompass such misconduct, timely providing written notice of the expanded scope to the subject judge."

The statute itself does not expressly mention such expansion of a committee investigation. It simply states, "Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit." 28 U.S.C. § 372(c)(5).

Judge McBryde argues that Rule 9(A) is improper because it is inconsistent with the statute. He reads the statute to mean that a special committee shall conduct an investigation <u>of the complaint</u> as extensive as it considers necessary, and no more.

Although the statute certainly does not expressly state that a special committee investigation may be expanded beyond the four corners of the original complaint, the statute does say that "[e]ach judicial council . . . may prescribe such rules for the conduct of proceedings under this subsection . . . as each considers to be appropriate." 28 U.S.C. § 372(c)(11). The statute thereby invites each judicial council to adopt any reasonable elaboration of the statutory procedures that it thinks proper, as long as the result is not inconsistent with the statute.

The Fifth Circuit, in the light of its experience under the statute, has exercised the discretion preserved to it by Congress to determine that special committee expansion of an investigation should be permissible. That determination does not fly in the face of any express statutory commandment and therefore does not exceed the bounds of appropriate circuit discretion.

Suppose there had been no Fifth Circuit Rule 9(A). In the midst of a special committee investigation the chief judge could, in effect, expand the special committee's investigation by identifying a new complaint under the statute, assigning it to the existing special committee for investigation, and so notifying the judge complained against. The special committee in turn could simply consolidate the new complaint or complaints with

the existing complaint or complaints. Under the Fifth Circuit rule, the special committee essentially does the same thing.[3]

The named judge arguably enjoys somewhat greater protection under Rule 9(A) than under a procedure of identifying additional complaints. Under Rule 9(A), a special committee of (in this case) five judges must agree to expand the investigation, whereas the statute permits the chief judge alone to identify a complaint and assign it for investigation by a special committee.

Judge McBryde further argues that even if Fifth Circuit Rule 9(A) is valid, "it requires that a committee may go outside the scope of a complaint only if it has specific information indicating misconduct by the judge; it by no means provides that a committee may engage in an unfettered investigation in order to develop such information in the first instance." This misconstrues the nature of the complaint investigation process.

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[3]Under section 372(c)(1), it is true, the chief judge may identify a complaint "by written order stating reasons therefor," whereas Fifth Circuit Rule 9(A) requires that the judge complained against be accorded "timely . . . written notice of the expanded scope . . ." These two procedural requirements admittedly are not precisely co-extensive, since Rule 9(A) does not require the special committee to state its reasons for expanding the scope of the investigation. This is not an important difference. The reasons for expansion of an investigation will always be implicit: that the special committee has developed reason to believe there may have been conduct prejudicial to the effective and expeditious administration of the business of the courts, or some disability, not alleged in a complaint. Under Rule 9(A), therefore, the named judge is accorded the same fundamental procedural rights that the judge would have been accorded if the chief judge had identified a new complaint or complaints under the statute. In other words, Rule 9(A) is not rendered inconsistent with the statute by virtue of any failure to accord the named judge fundamental procedural rights the statute would mandate.

In fact, as Judge McBryde points out, in the three orders in which Chief Judge Politz identified four complaints against the named judge, Chief Judge Politz did not state his reasons for doing so, as section 372(c)(1) required him to do. This procedural error did not perpetrate any fundamental unfairness on the named judge; the reasons for identifying the complaints were plain enough. A technical, harmless error of this kind surely does not call into question all of the proceedings that followed.

Where the complaint suggests there may be a pattern of objectionable conduct, the special committee may conduct some inquiry into whether or not such a pattern may exist. If there appears to be evidence that it may indeed exist, the committee may then formally expand the investigation to include other instances in which the pattern of objectionable conduct may have manifested itself, with notice to the judge complained against as required by Fifth Circuit Rule 9(A).

Not only is it permissible for a special committee to do this, it is affirmatively desirable. An individual complainant will often be in a poor position to allege or substantiate patterns of misconduct beyond his or her particular experience with the judge complained against. Where a complaint has some apparent substance, often the special committee would be shirking its statutory responsibility for the effective and expeditious administration of the business of the courts if it failed to make some inquiry into whether there was indeed a pattern of similar objectionable conduct.[4]

This does not permit the special committee to conduct an "unfettered investigation" "outside the scope of the complaint," as Judge McBryde would have it. The committee's inquiry is confined to the pattern of conduct raised in the complaint. The judge is charged with abusing counsel in a case; has he done so in other cases? Certainly the special committee cannot, in investigating a complaint of abusive treatment of counsel, conduct an inquiry into wholly unrelated matters such as

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[4]The purpose of this complaint process is to promote the effective and expeditious administration of justice, and as such the process works in tandem with informal and corrective mechanisms. Thus, when the chief judge receives a complaint, whether formal or informal, that charges a judge with abusive treatment of counsel in a particular case and that appears to have some substance, it is entirely appropriate for the chief judge to inquire into whether or not the judge has engaged in a pattern of similar abusive conduct that has manifested itself in other proceedings. If the inquiry suggests there may indeed be such a pattern, the chief judge may properly identify a complaint to trigger an investigation of the matter, or the chief judge may choose to deal with the problem informally. There is no reason why the same kind of process cannot be followed once a complaint has been given to a special committee for investigation.

whether the judge has demonstrated ethnic prejudice, engaged in ex parte contacts, or participated in political fundraising. But the special committee has not done so here.

In other words, Judge McBryde is correct when he argues that a special committee investigation is limited to the matters properly before the special committee, and that a special committee cannot range beyond the allegations of the complaint, fish for potential charges unrelated to the complaint, and then formally expand the investigation to encompass these new and unrelated charges. But the judge takes too narrow a view of what constitutes an investigation limited to the complaint. Where the complaint alleges abusive treatment of counsel, the special committee may permissibly inquire into other possible instances of such abuse, even though these other instances are not specified in the complaint. If evidence of a possible pattern of misconduct is found, the committee may then expand its investigation accordingly.

Judge McBryde complains that the judicial council ultimately ordered sanctions against him based entirely on incidents that were not the subject of any of the original five complaints filed or identified against him. Even if this assertion were true, it is of no consequence. The original five complaints unquestionably were sufficient under the statutory standards to justify the chief judge's appointment of a special committee to investigate their allegations. Once the special committee was in place, it properly expanded its investigation beyond the original five complaints. The matters raised in the expanded investigation were legitimately before the judicial council to precisely the same extent as the matters raised in the original complaints.

Notice to Judge McBryde of the expansion of the investigation. We will now turn to Judge McBryde's claim that the circuit council failed to give him timely and adequate notice of the expansion of its investigation, as Rule 9(A) requires.

On July 25, 1997, the special committee's counsel sent counsel for Judge McBryde a nine-page letter notifying the judge of a number of matters the investigation would be expanded to include, listed under the headings "conduct involving lawyers" and "conduct involving other judges." Each

matter was accompanied by a paragraph of explanation. This was done in preparation for the special committee's hearings scheduled for August 25-29, 1997.

Only five days before the onset of those hearings, on August 20, 1997, the special committee's counsel faxed Judge McBryde's counsel a letter adding three additional witnesses, with a brief explanation of the subject matter about which each would testify. For two of the witnesses, this explanation consisted of a statement that the witness would testify about Judge McBryde's conduct in a named case, without specifying the alleged conduct in question. The letter added that the special committee's counsel might present evidence concerning the judge's unspecified conduct in another named case.

After Judge McBryde protested that he needed more time to prepare to defend himself against all these additional allegations, further hearings were scheduled for September 29, 1997. Thus, when he asked for more time, he was given more time, an additional month. The hearings resumed September 29, 1997, through October 2, 1997.

In the meantime, on September 17, 1997, the special committee's counsel sent counsel for the named judge a letter listing the four witnesses he intended to call at the resumed hearings, and setting forth the projected subject matter of the testimony of each. Only two of these witnesses were new.

It is hard to think that the amount of explanation given Judge McBryde as to each new matter to be investigated was deficient. The letters sent by the special committee's counsel gave plain notice of the subject matter to be investigated. Portions of the notice given, it is true, merely referred to the judge's unspecified conduct in a named case. As a practical matter, though, it is hard to think that the judge would not be aware of what was meant. Ideally, perhaps, a fuller description could have been given, but we are by no means convinced that the judge's rights actually were prejudiced by any failure to provide a more detailed explanation.

It is true that when the judge was notified on July 25 of the expansion of the investigation, the judge had only a month until August 25 to prepare a defense to these new charges. Subsequently, however, the committee scheduled new hearings

for September 29 to give him an additional month. As for the additional matters specified in the special committee's counsel's August 20 fax, the judge had five weeks until September 29. Committee counsel's September 17 letter gave the judge only twelve days until the hearing, but it listed only two additional witnesses. On its face this seems adequate, and we see nothing specific in the judge's voluminous filings to suggest that the judge in fact was prejudiced by any lack of time to prepare.

Other procedural issues. Judge McBryde also objects to the lack of time he was afforded to file a response with the judicial council to the special committee's report and recommendation. He was served with a copy of the special committee report on December 4, 1997, with the judicial council scheduled to meet to consider the matter on December 17. This gave the judge less than two weeks to respond. The judge on December 8 filed a motion for enlargement of time to respond and for postponement of the meeting, which the special committee denied. When the judge did file a response, along with a motion to dismiss and a motion for recusal or disqualification, on December 15, the council members had only a day before their meeting to consider his filings.

At that December 15 meeting, however, no resolution was reached as to how to resolve the complaints against Judge McBryde. No vote was taken on the matter. The judge was given time to supplement his responses after the meeting, and he did file supplemental and "corrected" responses on December 22. The council's final order issued on December 31, so the council members had over two weeks to review and consider the judge's responses and motions before the matter was finally disposed of.

Considering that the special committee's report is 159 pages long and that it recommends, among other things, the one-year suspension of case assignments to an Article III judge, this is, to be sure, an expedited schedule. On the other hand, by December 15 counsel for Judge McBryde did manage to submit a 134-page response, a 62-page memorandum in support of their motion to dismiss, and a 93-page second motion for recusal or disqualification. It is hard to take seriously the judge's charge that he did not have an adequate opportunity to prepare

a response to the special committee's report when his attorneys in fact generated almost 300 pages of responsive argument.

A little over two weeks, it is true, was not a long time for the members of the judicial council to review almost 300 pages of argument. The council, however, has discretion to set its deadlines without regard to the possibility that it will be inundated with argument far in excess of the length limitations ordinarily imposed upon parties to an appeal. Only in extraordinary circumstances would this committee review a circuit council's scheduling of its deliberations. If the council believed it had adequate time to consider the judge's arguments -- and clearly it did believe so -- we see no occasion here to look further.

Judge McBryde's other procedural objections lack substance. Since the judicial council did not rely on any finding with respect to them, all of the judge's grievances regarding them are moot.

The judge's quarrels with an October 19, 1995 hearing held by the special committee are all meritless because that hearing was not part of these section 372(c) proceedings. Judge McBryde had filed with the judicial council a request that the council redress the reassignment, by Chief Judge Jerry Buchmeyer of the United States District Court for the Northern District of Texas, of two cases from Judge McBryde to himself. The council decided to hold a hearing on Judge McBryde's request, and further decided that since a special committee already had been convened to consider independent section 372(c) complaints against the judge, it would be efficient and convenient for the special committee to conduct this hearing. The judge was informed from the outset that the purpose of the hearing was to consider the judge's request for assistance pursuant to the council's section 332 authority, and that it was not part of the section 372(c) complaint proceedings.

At the hearing, once Judge McBryde had testified, he was told he could not be present for the remainder of the testimony. This was done because the committee feared the other witnesses would be intimidated by his presence. Such a procedure would have been impermissible in a section 372(c) proceeding as a violation of both the statute and the Fifth Circuit Rules, but it

was perfectly within the discretion of the judicial council in the exercise of its section 332 authority.

At a later time, certainly, the judges who presided over this section 332 hearing may have been influenced in their handling of the section 372(c) investigation by testimony they heard there, just as Judge McBryde alleges. But there is nothing wrong with this. As we will discuss in the next section, these are quasi-administrative/quasi-judicial proceedings, not judicial ones. Judges may bring to bear in section 372(c) proceedings information and impressions they may have gained in prior attempts to resolve the problems at issue. In fact, the statutory scheme encourages them to do so.

Disqualification of Certain Judicial Council Members

Judge McBryde argues that Chief Judge Politz and a few other judges (the members of the special committee and a district judge from Judge McBryde's district) should have recused themselves from the judicial council in this matter. Judge McBryde points out that Judge Politz was involved in Chief Judge Buchmeyer's reassignment to himself of two cases from Judge McBryde's docket, although Judge Politz was not involved in the underlying cases themselves. Judge McBryde also argues that Judge Politz and the other judges he wanted disqualified brought to the judicial council's proceedings information they gained outside the formal section 372(c) process.

In December 1997 the judicial council, in response to Judge McBryde's motion, ruled unanimously that there was no cause for any of the challenged judges to be disqualified from participating in the council's proceedings. We do not review that determination de novo. It is a mixed question of law and fact, as to which we give substantial deference to the judicial council's finding.

Judge McBryde's position misapprehends the nature of a section 372(c) proceeding. A chief judge need not recuse from participation in complaint proceedings merely because the proceedings involve matters with which the chief judge was concerned in the course of performing his administrative responsibilities as chief judge. This will often be the case. Indeed, the current system of judicial discipline strongly

encourages informal and corrective action by the chief judge to solve problems without resort to formal complaint proceedings. It would undermine this system if the chief judge were discouraged from doing his job at the informal and corrective stages for fear that he would later be required to recuse himself in any formal investigation.

In addition, an important reason that authority to investigate complaints is assigned to local judges under the current system is that local judges are expected to bring to bear their knowledge of the judge complained against, the complainant, and local circumstances. Under this system, the chief judge is ordinarily expected to be involved in and to inform himself about the matter at an early or pre-complaint stage, and to use the information and impressions gained thereby to help shape any later decisions in formal complaint proceedings. This is not a traditional judicial proceeding, in which a judge must recuse himself if he has extra-judicial knowledge about the case at bar. This is a quasi-judicial, quasi-administrative proceeding. A judge need not recuse from judicial council participation merely because the judge has precisely the knowledge of local personalities and circumstances the system wants him to have.[5]

This conclusion is strongly suggested on the face of the statute itself. The Act gives the chief judge authority to identify

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[5]Indeed, even if Judge Politz's recusal were sought in a traditional judicial proceeding rather than in a section 372(c) proceeding, there is authority that the kind of knowledge Judge Politz brought to the proceeding still would not require recusal. In Duckworth v. Department of the Navy, 974 F.2d 1140 (9th Cir. 1992), the Ninth Circuit held that the fact that then-Chief Judge Wallace had previously dismissed a section 372(c) complaint filed by the plaintiff against the district judge in that case did not require Judge Wallace to recuse himself from sitting on the panel hearing the plaintiff's appeal. Although Judge Wallace did have some prior knowledge of facts relevant to the appeal by virtue of ruling on the misconduct complaint, this was not "extrajudicial" knowledge requiring recusal under 28 U.S.C. § 455. Instead, the court ruled that "[t]he administrative actions of a judge in his or her official capacity [are] judicial, rather than extrajudicial" for recusal purposes, id. at 1143, so that information obtained by a chief judge in performing administrative functions under section 372(c) is not disqualifying as "extrajudicial" knowledge.

complaints on the basis of available information, section 372(c)(1), and to conclude proceedings on the ground that appropriate corrective action has been taken, section 372(c)(3)(B). Yet the statute directs the chief judge to appoint himself to any special committee convened to investigate a complaint. Section 372(c)(4)(A). Clearly the statute does not contemplate that the chief judge ordinarily should be precluded from service at the investigatory stage because of earlier efforts to resolve the matter short of investigation.

Indeed, Fifth Circuit Rule 17(a) states that even where the chief judge identified the complaint (here, Chief Judge Politz identified several of the complaints against Judge McBryde), "A chief judge who has identified a complaint under rule 2(J) will not be automatically disqualified from participating in the consideration of the complaint but may disqualify as a matter of personal discretion." Chief Judge Politz did not abuse that discretion by declining to disqualify here.

Judge McBryde makes much of the role Chief Judge Politz played in the dispute surrounding the reassignment of two cases to Chief Judge Buchmeyer. Assuming, arguendo, the truth of Judge McBryde's factual assertions regarding Chief Judge Politz's role in attempting to settle that dispute, we see no impropriety. At that time a special committee already had been appointed to investigate complaints against Judge McBryde. Chief Judge Politz apparently attempted to persuade Judge McBryde to modify his behavior to moot the whole matter and spare both himself and the Fifth Circuit what might be a long and costly investigation. This is precisely the kind of attempt at suasion the system means to foster and encourage.

For the same reasons, there is no substance to Judge McBryde's disqualification claims vis a vis other judges besides Judge Politz. Members of a special committee who are also members of the judicial council need not ordinarily recuse themselves from judicial council consideration of the special committee's report. There is no exceptional circumstance here that would dictate recusal. The fact that judicial council members may have had knowledge of the matter gained outside the section 372(c) proceedings, but in their capacity as members of the council, does not disqualify them.

The Judicial Council's Findings

Merits-relatedness. A central theme of Judge McBryde's submissions to this committee has been that essentially all of the conduct for which he is to be sanctioned is "directly related to the merits of a decision or procedural ruling," section 372(c)(3)(A)(ii), and therefore not cognizable under the Act at all. In response to the argument that he is being sanctioned not for the substance of his rulings but for a pattern of conduct, he replies that a judge cannot be sanctioned because of a pattern of allegedly improper rulings, any more than a judge could be sanctioned for a single allegedly improper ruling. Allegations are no less merits-related, he contends, because they challenge the merits of many rulings and not just some particular one.

Although a judge indeed may not be sanctioned out of disagreement with the merits of rulings, a judge certainly may be sanctioned for a consistent pattern of abuse of lawyers appearing before him. The fact that that abuse is largely evidenced by the judge's rulings, statements, and conduct on the bench does not shield the abuse from investigation under the Act. To the contrary, allegations that a judge has been habitually abusive to counsel and others may be proven by evidence of conduct on the bench, including particular orders or rulings, that appears to constitute such abuse.

To say that abuse of lawyers, or other forms of misconduct, that finds expression in a judge's rulings may be remedied under the Act is not to say that a judge's rulings themselves may be challenged under the Act. That of course remains the sole province of the court of appeals.

For the same reasons, sanctions in these circumstances do not trammel judicial independence. The sanctions are not based upon the legal merits of the judge's orders and rulings on the bench, but on the pattern of conduct that is evidenced by those orders and rulings.

The same principle holds true when it is alleged that a judge has accepted a bribe, has been motivated by racial, ethnic, or religious bias, or has issued rulings as part of an improper vendetta or some other illicit or vindictive motive. A judge could not evade discipline for such a pattern of conduct by arguing that this was an attack on his rulings, and that if litigants

believed his rulings were incorrect and the product of improper motivation, that was properly a matter for appeal, not for a misconduct proceeding. If a judge's behavior on the bench, including directives to counsel and litigants, were wholly beyond the reach of the Act, the Act would be gutted.

This view of the Act is amply supported by past decisions of this committee. In No. 94-372-001, 37 F.3d 1511 (1994), the complaint was that a district judge, in the course of recusing himself from a lawsuit in which the complainant was a party, issued a public order revealing that the reason for his recusal was that the complainant, whom the judge named, had previously filed a complaint of judicial misconduct against him under section 372(c). Complainant alleged that in so doing the judge violated the local D.C. Circuit rule imposing confidentiality on section 372(c) proceedings, including the identity of the complainant. This local rule served the purpose of protecting a complainant who desired confidentiality from fear of retaliation or other adverse consequences from the filing of a complaint.

The Judicial Council of the D.C. Circuit, by a 5-4 vote, dismissed the complaint in part because the judge's alleged misconduct arose "out of the performance of judicial duties as an Article III Judge." Indeed, the basis for the complaint was that certain aspects of the judge's order had constituted misconduct.

This committee soundly rejected the judicial council's position. This committee stated that the judicial council's

> "suggestion is based upon a misapprehension of the scope and purposes of § 372(c) and its cognizability provisions. . . .
>
> "It would exempt from the Act a wide range of conduct that has nothing to do with the merits of judicial rulings. Under the majority's formulation, for example, any misconduct by a judge that occurred while a judge was performing judicial duties -- accepting bribes, uttering ethnic slurs, or communicating ex parte -- would not be cognizable under the Act.
>
> "In fact, the central thrust of the Act is to make judges accountable for precisely this sort of conduct: conduct not

related to the merits of rulings that arises in the course of the performance of judicial duties . . . ."

Id. at 1515.

In No. 88-372-001 (1988), this committee affirmed a reprimand (albeit reducing it from a public reprimand to a private reprimand) of a district judge for stating, in the course of a judicial proceeding, that he would not permit the complainant, a well-known attorney, to practice in his courtroom. On Judge McBryde's logic, the district judge's statement would amount to a ruling regulating the appearance of attorneys in that judge's court. Once this ruling was applied in a particular case in which the complainant sought to appear, the ruling could be reviewed by the court of appeals, and if improper it could be vacated. Instead, both the Judicial Council of the First Circuit and this committee assumed, without explicitly discussing the point, that since the judicial council had found the district judge's statement to have been made as part of a personal vendetta directed at the complainant, the statement was subject to discipline, regardless of whether it could be characterized as a judicial ruling.[6]

Judge McBryde cites a host of orders issued by chief judges dismissing complaints on grounds of merits-relatedness. In some of these, it is true, the complainant went beyond merely attacking the merits of rulings, and raised allegations that particular rulings had resulted from some form of illicit motive or were examples of improper conduct. In those cases, however, the complainant failed to provide adequate supporting factual substantiation to justify an investigation into his or her claims of improper animus or conduct. Absent such factual support, these complaints' allegations were reduced to mere

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[6]Another instructive example -- in a matter that did not come before this committee -- is No. 88-2101 (Jud. Council 11th Cir. 1990). There a magistrate judge was publicly reprimanded by the Judicial Council of the Eleventh Circuit for ordering U.S. Marshals to take into custody a criminal defense attorney and bring that attorney, in handcuffs and chains as required by the Marshals' policies, to a hearing before the magistrate judge. In a sense, this directive constituted a "ruling" by the magistrate judge. Yet the magistrate judge's conduct, as evidenced by this "ruling," was deemed sanctionable because it was so palpably abusive toward counsel.

attacks on the merits of the rulings themselves, and thus were properly dismissed. The instant matter, of course, is quite different in that the claims of improper conduct were supported by considerable substance.

The burden of proof. Judge McBryde argues that a judicial council may take the "drastic step" of punishing a federal judge only when the evidence is "clear and convincing" that the judge has committed conduct prejudicial to the effective and expeditious administration of the business of the courts. In his view, application of the preponderance-of-the-evidence burden of proof commonly employed in civil litigation would be inappropriate.

There is nothing in the statute or the Fifth Circuit Rules that addresses this question. Nor is this committee aware of any decision in the eighteen years of the Act -- whether by this committee, a judicial council, or a chief judge-- delineating such a standard.

Judge McBryde points to authority that a clear and convincing evidence standard governs disciplinary proceedings against attorneys, citing In re Medrano, 956 F.2d 101, 102 (5th Cir. 1992). It is generally true, also, that a clear and convincing evidence standard is applied in most states' disciplinary proceedings against state judges. See, e.g., In re Deming, 108 Wash. 2d 82, 109, 736 P.2d 639, 653 (1987).

Even so, it is by no means clear that the clear and convincing evidence standard is the appropriate one. There are important distinctions between attorney discipline and discipline of most state judges, on the one hand, and federal judicial discipline short of impeachment on the other. The Fifth Circuit noted in Medrano, supra, that "[a] disbarment proceeding is adversarial and quasi-criminal in nature," and therefore "[a] federal court may disbar an attorney only upon presentation of clear and convincing evidence sufficient to support the finding of one or more violations warranting this extreme sanction." Id. at 102. A section 372(c) proceeding against a federal judge is neither adversarial nor quasi-criminal. The functional equivalent of disbarment, i.e., removal of the judge from office, is beyond the authority of the judicial council. In most states, by contrast, the state judges do not

enjoy a guarantee of life tenure, and removal from office is a possible outcome of the judicial discipline process.

It is of course true that suspension of the assignment of new cases to a judge for one year is a very severe sanction. Nonetheless these are not unequivocally "judicial" proceedings. They do not involve the adjudication of an Article III case or controversy. As this committee has stated, "While section 372(c) proceedings have an adjudicatory aspect, they also have an administrative and managerial character not present in traditional adjudication by courts." No. 93-372-001, 9 F.3d 1562, 1566 (1993). The circuit council's actions are taken in furtherance of the council's responsibilities for the administration of the courts. The matter is thus more administrative than quasi-criminal, so that a standard more exacting than the usual preponderance standard may not be necessary. It would be hard to argue that a chief judge and judicial council must be restrained by a clear and convincing evidence standard in whatever factual determinations they must make in the everyday process of administering the business of the circuit.

In any event, this committee need not determine this issue here. The evidence adduced by the special committee permits this committee to conclude that whether a preponderance standard or a clear and convincing evidence standard is applied, that standard was met here, as we will discuss in the next section.

The factual basis for the judicial council's sanctions. In its December 31, 1997 Order and Public Reprimand, the judicial council made the following findings of fact as to Judge McBryde's conduct:

> "Judge McBryde has engaged in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and discord within, the federal judiciary. This conduct is unacceptable and damaging to the federal judiciary.
>
> "Judge McBryde's intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others has detrimentally affected the effective administration of justice and the business of the courts in the Northern District of

> Texas. Judge McBryde has abused judicial power, imposed unwarranted sanctions on lawyers, and repeatedly and unjustifiedly attacked individual lawyers and groups of lawyers and court personnel. This pattern of behavior has had a negative and chilling impact on the Fort Worth legal community and has, among other things, prevented lawyers and parties from conducting judicial proceedings in a manner consistent with the norms and aspirations of our system and is harmful to the reputation of the courts."

The judicial council, out of concern for the confidentiality interests of the witnesses who had testified before the special committee, opted not to make public any of the specific incidents that underlie this finding. As we conclude in the next section, this committee will not disturb the judicial council's determination that this degree of public disclosure, and not more, is appropriate at this time. This committee therefore cannot comment specifically on the evidence that supports the judicial council's findings, because that evidence remains confidential.

This committee has reviewed the record in detail, applying a review standard of substantial deference to the judicial council's fact finding. The committee concludes that whatever standard of proof might be required to support the judicial council's fact finding -- whether a clear-and-convincing-evidence standard or a preponderance-of-the-evidence standard -- the evidence adduced regarding Judge McBryde's patterns of conduct is more than sufficient to support the judicial council's findings. As to certain matters, the evidence is undisputed; as to many, Judge McBryde has disputed testimony and evidence against him. In all instances, however, there was more than ample evidence to permit the special committee, judging the credibility of the live witnesses before it, to reach the factual conclusions that it did.

The judge did, to be sure, present testimony from a number of lawyers who said they have been treated fairly by the judge, do not feel intimidated by him, and are happy to appear before him. The judge also presented testimony from jurors who have sat on cases presided over by him -- including jurors who sat on cases alleged to exemplify the judge's pattern of mistreatment

of counsel -- who said that they saw no mistreatment, that they appreciated the judge's efforts to move cases along, and that they enjoyed being impaneled on his jury. Even if this testimony is believed, however, there is nothing in it that undercuts the impressive mound of evidence that Judge McBryde has frightened and intimidated a significant portion of the local bar. The special committee and judicial council also were entitled to discount the testimony of jurors, who as laypersons without significant court experience cannot ordinarily be expected to understand the proper contours of the judge-counsel relationship and evaluate a judge's conduct in the light of that understanding.

The Judicial Council's Sanctions

The public reprimand. Judge McBryde argues that the public reprimand that the judicial council intends to issue would be improper because it does not adequately specify the conduct that gives rise to the reprimand. Although the special committee recommended that its long report be made public and appended to any public reprimand, the judicial council's order did not accept this recommendation, and would keep the report private. As a result, all that is public about the basis for the reprimand is the two-paragraph finding, that we quoted in the previous section, about the judge's conduct that appears in the text of the judicial council's Order and Reprimand. The council's public Order and Reprimand would not describe any of the specific incidents that underlie the reprimand.

To this Judge McBryde objects, stating, "Basic fairness dictates that if a man is to be held up before his community as a wrongdoer, there should at least be some explanation of what he has done and why it is wrong, so that the public can evaluate the merits of the reprimand and the subject of the reprimand can respond appropriately."

The judicial council's sanctions do not rest on only one or two specific incidents of misconduct, which one might ordinarily expect to be referred to in the text of a public reprimand. They are based instead on a broad pattern of conduct that manifested itself in many specific incidents, none of which standing alone may have justified a sanction. We think that where sanctions are based upon such a pattern of conduct, a

judicial council may provide the public a short general description of the pattern of conduct, rather than a litany of all the specific underlying details.

Also, the judicial council argues in justification that "not releasing the Report protects the privacy interests of the many witnesses who participated in this proceeding and whose testimony and experiences are summarized in the Report." Given that the council's order does at least provide a general description of Judge McBryde's misconduct, this committee defers to the judicial council's judgment as to the need to protect the privacy interests of witnesses.

Judge McBryde has a remedy under 28 U.S.C. § 372(c)(14)(C) for his concern that more of the confidential proceedings be made public. If, under that section, he requests in writing that all or any portion of the proceedings be made public, it can be done with the assent of the chief judge of the circuit. The chief judge's assent is required in order to protect any confidentiality interests that witnesses or complainants may have in the proceedings. If the chief judge were to grant such a request, in whole or in part, the chief judge could redact any materials to be made public in whatever manner the chief judge considered appropriate in order to preserve these privacy interests.

Judge McBryde argues that he has already pushed to make public the entire record of the proceedings, and the chief judge has not agreed. Judge McBryde does not wish to make public only the special committee report, with what he considers to be its one-sided view of the matter. Nonetheless, whatever the chief judge's position may have been in the past, Judge McBryde of course may renew his request in the future, when the circumstances surrounding the request conceivably may change.

The one-year suspension. Judge McBryde argues that the judicial council's order directing that no new cases be assigned to him for one year is an unconstitutional interference with the powers and prerogatives of an Article III judge.

As Judge McBryde acknowledges, however, this committee in the past has refused to consider challenges to the constitutionality of the Act, either on its face or as applied. In

no. 84-372-001, which involved a complaint of sexual harassment filed by clerk's office employees against a judge, the judge argued before this committee that the Act was unconstitutional on its face and that it would violate the Constitution to apply the Act to punish the conduct he was found to have engaged in. This committee declined to entertain these contentions, stating:

> "We have no competence to adjudicate the facial constitutionality of the statute or its constitutional application to the speech of an accused judge, however inappropriate or offensive his words may be. We are not a court. Our decisions are not subject to review by the Supreme Court of the United States. We sit in review of the action of the Circuit Council. The courts of the United States are open for the adjudication of such questions."

We similarly decline to undertake constitutional adjudication here.[7]

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[7]No court has ever adjudicated the constitutional validity of the Act's sanction of a temporary suspension, for a time certain, of the assignment of cases to a federal judge. Indeed, the instant matter is the first time this suspension sanction, as authorized by 28 U.S.C. § 372(c)(6)(B)(iv), has ever been invoked.

Chandler v. Judicial Council, 398 U.S. 74 (1970), did involve United States District Judge Stephen Chandler's challenge to a pre-Act order of the Judicial Council of the Tenth Circuit suspending the assignment of new cases to Judge Chandler. The Supreme Court, however, declined to reach the merits of this issue.

Judge McBryde quotes at length from Justices Black and Douglas who, in dissent in Chandler, argued that such a suspension worked an unconstitutional infringement on the independence of an Article III judge. The Court majority, by contrast, stated that for "a complex judicial system [to] function efficiently," judges need a "statutory framework and power whereby they might 'put their own house in order.' . . . But if one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse." Id. at 85. Although the majority opinion drew back from attempting to define the permissible extent of a judicial council's power, it did state, "We see no constitutional obstacle preventing Congress from vesting in the Circuit Judicial Councils, as administrative bodies, authority to make 'all necessary orders for the effective and expeditious administration of the business of the

Judge McBryde further contends that the statutory provision authorizing a judicial council to "order . . . that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint," 28 U.S.C. § 372(c)(6)(B)(iv), was intended by Congress to be used only for a "remedial" suspension of cases, whereas the judicial council's suspension here is impermissibly "punitive" in its goals.[8] Thus, he argues, its use for punitive purposes is not only unconstitutional but also in excess of the statutory authority granted to judicial councils by the Act. The judicial council has conceded, in its filings before this committee, that indeed it did have both punitive and remedial goals in mind in invoking the sanction.

We need not consider Judge McBryde's objections to the punitive aspects of the suspension of case assignments because we decline to affirm the suspension insofar as it was intended

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courts within [each] circuit.'" Id. at 86 n.7.

[8]Judge McBryde points to Senate legislative history, discussing an earlier version of the legislation that became the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c), which stated,

> "It is important to point out the Committee's clear intention to use the word 'temporary' in this subsection. Serious constitutional problems may be raised concerning the power of the circuit council to prohibit the assignment of further cases to the judge in question. The use of the word 'temporary' is designed to convey the clear intention of the Committee that this sanction is to be used only on rare occasions and only as an interim sanction. For example, the refusal of the council to allow a judge to accept further cases while undergoing treatment for alcoholism or until the reduction of an excess backlog of cases are examples where this sanction may be invoked."

S. Rep. No. 96-362 (96th Cong., 1st Sess. 1979) at 10, reprinted in 1980 U. S. Code Cong. & Ad. News 4315, 4323-24. Legislative history from the House side also stated, "It is the view of the Committee that all the sanctions relating to the discipline or disability treatment of tenured judges mentioned above are temporary in nature; implicitly, a judge who has recovered from a disease or who has remedied the conditions that caused the sanction can and should be restored to office." H.R. Rep. No. 96-1313 (96th Cong., 2d Sess. 1980), at 12.

to punish Judge McBryde for past misconduct. Even with substantial deference to the judicial council's firsthand judgment about what constitutes an appropriate punishment, this committee believes that the judicial council's public reprimand -- a serious sanction -- is a sufficient punishment for the judge's past pattern of abusive conduct.

We do, however, affirm the suspension, in modified form, as a remedial measure intended to ameliorate Judge McBryde's behavior in the future. The special committee made it clear in its report that it did intend the suspension of new case assignments to serve very substantial remedial purposes. The special committee expressed its concern that during the committee's hearings,

> "Judge McBryde evinced no reflection or remorse concerning the totality of his conduct. . . . Aside from one or two instances . . . , Judge McBryde refused to acknowledge the impropriety of his actions. His repeated responses that his actions were proper and appropriate bespeak both of denial and the probability that, absent self-reappraisal, such conduct will not abate.
>
> "Depriving Judge McBryde of new assignments for this period will not prevent continued abuse, but it will provide him some opportunity for deep reflection, which is necessary and desirable."

The judicial council adopted the special committee report in this regard, since the council adopted that report "to the extent relevant to the action below."

We have thoroughly reviewed the evidence and we find that it justifies the judicial council's conclusions that Judge McBryde has generally refused to acknowledge the impropriety of his actions, and that an "opportunity for deep reflection" is desirable to permit him to consider the need to reform his conduct in the future. The judge has yet to give any indication that he accepts he has a problem, and until he does so there is little hope for improvement. A lightening of his case load will permit him to engage in the "self-appraisal" and "deep reflection" referred to by the special committee. The purpose of this suspension of new case assignments, therefore, is the same as in the case of a remedial suspension of new cases for a judge

with a substance abuse problem, or with some other physical or mental problem, who refuses to take steps to confront the problem. Thus, we uphold the suspension as aimed at modifying Judge McBryde's pattern of behavior toward attorneys, court personnel, and others, not as punishing him for past misbehavior.

As formulated by the judicial council, the suspension is for the definite period of a year. In keeping with the purely remedial nature of the suspension, however, the suspension should not continue once it has fairly achieved its remedial purpose. The suspension should terminate in the event that, during the year, Judge McBryde shows significant signs of modifying his conduct. In the analogous situation of a one-year suspension of case assignments to a judge with a substance abuse problem, for example, one would expect the suspension to abate if the judge completed successful treatment for the problem within the year. We therefore modify the terms of the suspension of new case assignments in order to bring it within Judge McBryde's power to effect an end to the suspension before the expiration of a year.

The committee directs the judicial council to terminate the suspension of new case assignments before the expiration of the year if the council finds, either upon an application by Judge McBryde or on its own motion, that Judge McBryde's conduct indicates that he has seized the opportunity for self-appraisal and deep reflection in good faith, and that he has made substantial progress toward improving his conduct.

The committee notes, in affirming the one-year suspension as purely remedial, that we cannot be sure that all of the members of the judicial council who voted for the suspension (which was approved by a vote of 13 to 6) would have voted for a purely remedial suspension. It is possible that some council members may have supported the suspension only for purposes of punishment, or for both punitive and remedial purposes. Nonetheless we see no need to remand this matter to the judicial council for the council's consideration of the advisability of a purely remedial suspension. The judicial council of course may reconsider its suspension at any time it sees fit to do so. It goes without saying that if the judicial

council concludes, for example, that a remedial suspension is not appropriate, that a one-year suspension is too lengthy for purely remedial purposes, or that the period of time that has elapsed since Judge McBryde learned of the council's decision to impose a public reprimand has been sufficient to give the judge an opportunity to reflect, this committee's affirmance of a one-year remedial suspension in no way precludes the judicial council from revisiting the matter.

The reassignment order. There is plenty of evidence in the record to support the judicial council's implicit conclusion that there was a significant risk that Judge McBryde might attempt to retaliate in some fashion against witnesses who had testified against him, or at least that witnesses reasonably perceived such a risk. The judicial council has a strong interest in protecting the integrity and effectiveness of its investigation, which could be seriously hampered if witnesses believed they would be left unprotected against such retaliation. Thus, the judicial council ordered that "Judge McBryde, for a period of three (3) years from the effective date of this Order, is not to participate in (i) cases now pending before him (other than any as to which there are appellate proceedings) in which any of the attorneys listed on Attachment A are currently involved, and (ii) any and all cases filed after the effective date of this order in which the initial notice of appearance includes any of the attorneys listed on Attachment A."

Judge McBryde argues that the judicial council lacks authority to order the recusal of a judge from any case. Such authority, he asserts, is reserved to the court of appeals on review of determinations by the district judge on recusal motions properly brought under 28 U.S.C. §§ 144 and 455. These recusal decisions are decisions on the merits just like any other rulings handed down by a district judge. Thus, "[t]he complaint procedure may not be used to have a judge disqualified from sitting on a particular case. A motion for disqualification should be made in the case." Rule 1(e) of the Illustrative Rules Governing Complaints of Judicial Misconduct and Disability.

We do not quarrel with the proposition that it is for the courts, not for a non-court such as the judicial council, to

determine the application of sections 144 and 455 in particular cases. That is not, however, what the council's reassignment order does.

A judicial council, exercising its authority under 28 U.S.C. § 372(c)(6)(B)(vii) to "order . . . such other action as it considers appropriate under the circumstances," may reassign cases as a result of a complaint proceeding if to do so is appropriate to foster the effective and expeditious administration of judicial business. Such a reassignment order is an entirely different thing from recusal under the recusal statutes, and is not governed by the standards set out in those statutes.[9] The council properly exercised just such authority by issuing the order for the purpose of protecting the integrity of its proceedings by guarding its witnesses against what it concluded was a genuine or reasonably perceived risk of retaliation by Judge McBryde.

Judge McBryde counters that nevertheless the judicial council is not a court, cannot exercise judicial power, and cannot issue rulings that dispose of issues in Article III cases and controversies. If Congress has given the courts of appeals authority to order reassignment of a district judge on some basis other than application of the recusal statutes, there is no question that those courts may properly exercise that authority. If, however, case reassignment amounts to a ruling in a case, involving exercise of the judicial power, then, the judge argues, the judicial council may not issue such an order.

The short answer is that the matter of case assignments is an administrative one, and does not involve the exercise of judicial power. Under 28 U.S.C. § 137, for example, where the judges of a district court do not agree on a system for case assignments

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[9]The judicial council analogizes its reassignment order to an order issued by a court of appeals under 28 U.S.C. § 2106, which has been interpreted to permit the court of appeals to reassign cases from one district judge to another. Such an order under section 2106 is an entirely different thing from a recusal order under the recusal statutes. As such, a section 2106 order is adjudicated under a different standard than the recusal standards applicable under 28 U.S.C. §§ 144 and 455. Liteky v. United States, 510 U.S. 540, 554 (1994).

among district judges, the judicial council, by exercise of its administrative authority, may impose a case assignment system. This does not inject the judicial council into judicial rulings in particular cases.

The council's reassignment order is akin to action under section 137. The council is exercising its administrative authority, not case-decisional authority, to protect the integrity of its proceedings by directing that Judge McBryde not participate in cases where his participation would threaten that integrity, i.e., in cases where witnesses adverse to him appear as counsel. Thus its action has nothing whatsoever to do with the circumstances of the particular cases in which those witnesses happen to appear. The council does not purport to direct Judge McBryde how to decide motions to recuse or how to apply the recusal statutes.

Only the judicial council is in a realistic position to take this action. The possibility of subsequent piecemeal rulings by the court of appeals, entered only months later in one or more cases, directing Judge McBryde not to participate in such cases would be less effective in protecting the integrity of the section 372(c) proceedings. Adverse witnesses awaiting such rulings would have much less assurance that they would be protected against feared retaliation.

Finally, Judge McBryde argues that the judicial council's reassignment order is unwise in its details and in its practical effects. He contends that the order gives the affected attorneys and their clients the kinds of opportunities for judge-shopping that the federal judicial system ordinarily frowns upon.

It is for the judicial council to determine how best to balance concerns about judge-shopping against the need it sees to protect witnesses against feared retaliation. The Act confers upon the judge complained against the right to seek Judicial Conference review in order to ensure the fairness and propriety of circuit council proceedings and orders affecting the judge's interests. When a judge argues that aspects of a council order -- wholly apart from their impact on the judge -- manifest an unwise and ill-considered approach to judicial administration, this begins to take the committee's review proceeding beyond its intended purpose.

This is not to say that this committee lacks authority to examine and modify the practical details and implementation of the council's reassignment order. We are loathe to exercise any such authority in the absence of some extraordinary circumstance, and we see nothing to justify such intervention here. As the council has pointed out, if the reassignment order causes problems, the council can issue additional supplemental orders to address them.

We have considered all of Judge McBryde's other arguments and find them meritless.

Conclusion

This committee affirms the December 31, 1997 Order and Public Reprimand issued by the Judicial Council of the Fifth Circuit in all respects except the following. Section 2 of the Order and Public Reprimand is modified to state: "Pursuant to 28 U.S.C. § 372(c)(6)(B)(iv), no new cases are to be assigned to Judge McBryde for a period of one (1) year from the effective date of this Order, unless and until the Council finds that Judge McBryde's conduct indicates that he has seized the opportunity for self-appraisal and deep reflection in good faith and that he has made substantial progress toward improving his conduct;".

This committee's stay of the judicial council's Order and Public Reprimand is hereby terminated.

FOR THE COMMITTEE

/s/
William J. Bauer
United States Circuit Judge[10]

September 18, 1998

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[10]This opinion was prepared by Judge William J. Bauer, with United States Circuit Judge Stephanie K. Seymour, United States Circuit Judge Cornelia G. Kennedy, United States District Judge Gordon Thompson, Jr., and United States District Judge Anthony A. Alaimo concurring.

## APPENDIX D

## THE JUDICIAL COUNCIL
## FIFTH JUDICIAL CIRCUIT

No. 95-05-372-0023
No. 95-05-372-0023A
No. 95-05-372-0023B
No. 95-05-372-0023C
No. 95-05-372-0023D

## IN RE: MATTERS INVOLVING UNITED STATES DISTRICT JUDGE JOHN H. McBRYDE, UNDER THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980

## ORDER AND PUBLIC REPRIMAND

WHEREAS a Special Investigating Committee of the Council (the "Special Committee"), pursuant to 28 U.S.C. § 372(c)(5) and Rule 9(A) of the Fifth Circuit's Rules Governing Complaints of Judicial Misconduct or Disability, conducted an investigation, held hearings over nine days during which over fifty witnesses testified, and received evidence regarding complaints against, and the conduct of, Judge John H. McBryde of the United States District Court for the Northern District of Texas;

WHEREAS, pursuant to 28 U.S.C. § 372(c)(5), the Special Committee issued a Report to the Council dated December 4, 1997; and

WHEREAS the Council has considered the record, the Special Committee's Report, the Responses thereto, and statements by counsel and Judge McBryde at the Council's December 17, 1997 meeting.

To the extent relevant to the action taken below, the Council adopts by a clear majority vote the Special Committee's Report, Findings of Fact, and Recommendations. Based thereon:

1. The Council hereby PUBLICLY REPRIMANDS Judge McBryde, pursuant to 28 U.S.C. § 372(c)(6)(B)(vi), for conduct

prejudicial to the effective and expeditious administration of the business of the courts within the Circuit and inconsistent with Canon 2(A) and Canon 3(A)(3) of the Code of Conduct for United States Judges.

Judge McBryde has engaged in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and discord within, the federal judiciary. This conduct is unacceptable and damaging to the federal judiciary.

Judge McBryde's intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others has detrimentally affected the effective administration of justice and the business of the courts in the Northern District of Texas. Judge McBryde has abused judicial power, imposed unwarranted sanctions on lawyers, and repeatedly and unjustifiably attacked individual lawyers and groups of lawyers and court personnel. This pattern of behavior has had a negative and chilling impact on the Fort Worth legal community and has, among other things, prevented lawyers and parties from conducting judicial proceedings in a manner consistent with the norms and aspirations of our system and is harmful to the reputation of the courts.

2. Pursuant to 28 U.S.C. § 372(c)(6)(B)(iv), no new cases are to be assigned to Judge McBryde for a period of one (1) year from the effective date of this Order; and

3. Pursuant to 28 U.S.C. § 372(c)(6)(B)(vii), Judge McBryde, for a period of three (3) years from the effective date of this Order, is not to participate in (i) cases now pending before him (other than any as to which there are appellate proceedings) in which any of the attorneys listed on Attachment A are currently involved, and (ii) any and all cases filed after the effective date of this order in which the initial notice of appearance includes any of the attorneys listed on Attachment A.

4. Consistent with 28 U.S.C. § 332(d)(2), the Council directs all judicial officers and employees within the Circuit, particularly the Chief Judge of the Northern District of Texas and the Clerk of the Court for the Northern District of Texas, to

take all necessary steps to carry into effect the above orders of the Council.

5. The Council hereby directs that implementation of this Order and Public Reprimand shall be stayed for 30 days after entry so that Judge McBryde may seek to appeal to, and obtain an additional stay from, the Judicial Conference of the United States. This Order shall also remain sealed during the period of any stay thereof.

This order is issued on the date recited below but shall not become effective until all stays have expired or been lifted.
New Orleans, Louisiana, this 31st day of December 1997.

FOR THE COUNCIL:

/s/
HENRY A. POLITZ, CHIEF JUDGE

**ATTACHMENT A**

Jay K. Gray
Matthew Golla
David Martin
Peter Fleury
Tim Henry
Frank McCown
Paul Stickney
Dominic Gianna
John Teakell
Arch McColl
Ira Kirkendoll
Michael Sanders
Richard Roper
Marc Barta
Paul Gartner
Michael Heiskell
Art Brender
Wayne Hughes
Claude Brown
Michael Snipes
Chris Milner
William Martin
Fred Schattman

Supreme Court, U.S.
FILED
011778 JUN 3 2001
OFFICE OF THE CLERK

No.

IN THE

# Supreme Court of the United States

THE HONORABLE JOHN MCBRYDE,

*Petitioner*,

v.

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## APPENDIX

**(Vol. II of II)**

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# APPENDIX E

## REPORT OF THE SPECIAL COMMITTEE OF THE FIFTH CIRCUIT JUDICIAL COUNCIL REGARDING COMPLAINTS AGAINST, AND THE INVESTIGATION INTO THE CONDUCT OF, JUDGE JOHN H. McBRYDE

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FIFTH CIRCUIT JUDICIAL COUNCIL

CONFIDENTIAL

DATE: DECEMBER 4, 1997

TO: MEMBERS OF THE FIFTH CIRCUIT JUDICIAL COUNCIL

SUBJECT: REPORT OF THE SPECIAL COMMITTEE OF THE FIFTH CIRCUIT JUDICIAL COUNCIL REGARDING COMPLAINTS AGAINST, AND THE INVESTIGATION INTO THE CONDUCT OF, JUDGE JOHN H. McBRYDE

## I. INTRODUCTION

On July 10, 1995, David H. Martin, Esq., filed a complaint pursuant to 28 U.S.C. § 372(c) against Judge John H. McBryde, United States District Judge for the Northern District of Texas, with the Fifth Circuit Judicial Council. On September 13, 1995, Chief Judge Henry A. Politz referred that complaint to a Special Committee for investigation and also identified a letter from Assistant Attorney General Frank Hunger of the Department of Justice (relating to Judge McBryde's conduct in United States v. Satz) as a complaint against Judge McBryde pursuant to the provisions of 28 U.S.C. § 372(c)(1). Following the direction of 28 U.S.C. § 372(c)(4)(A), Chief Judge Politz appointed (in addition to himself, as specified in the statute) Circuit Judges W. Eugene Davis (Chairman) and Robert M. Parker, and District Judges William H. Barbour, Jr. and Edward C. Prado to constitute the members of the Special Committee.

The Special Committee retained Robert B. Fiske, Jr. of Davis Polk & Wardwell as Special Counsel to assist in the investigation of Judge McBryde.

In addition to these Section 372(c) complaints, others were later filed. On March 18. 1996 Mr. Rex Whiteaker, a Postal Inspector, filed a complaint against Judge McBryde arising out of United States v. Satz. James S. Byrom, Esq., filed a Section 372(c) complaint arising out of Judge McBryde's conduct

during the trial in United States v. Bates. These complaints were referred to the Special Committee and consolidated with the Martin and Hunger complaints.[1]

After the formation of the Special Committee in September 1995, there ensued for over two years activities and proceedings involving this Section 372(c) proceeding. The length of time of this proceeding, the scope of the factual hearing, and the aggregate demands placed on the Judiciary (just in terms of the time devoted by the members of the Special Committee, the Judicial Council, and various Article III Judges acting in their judicial capacities) have been substantial, if not unprecedented. As background for this Report, the Special Committee believes that the Judicial Council is entitled to a concise explanation of the events and activities that occasioned the extended period of twenty-seven months between the formation of the Special Committee and the proffer of this Report to the Council.

## II. THE INVESTIGATION

From virtually the time of the formation of the Special Committee, its members became concerned about two things: first, that Judge McBryde may have a health problem (physical or mental) which affects his activities as a judge, and second, that Judge McBryde has engaged in a pattern of abusive behavior as a federal judge. The preliminary factual bases for these concerns, which emerged as general themes during the course of the investigation, arose from evidence received in an administrative hearing conducted by this same Special Committee in October 1995.[2] The Special Committee's concern that

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[1] A fifth complaint against Judge McBryde, filed by Howard Lee Carpenter on November 9, 1995, although similarly referred to and consolidated by the Special Committee, was eventually dismissed before the commencement of the evidentiary hearings.

The issues raised in the Byrom complaint involve the manner in which Judge McBryde conducts trials. The Special Committee heard a substantial amount of testimony on the subject of Judge McBryde's trial practices. That testimony and the Committee's findings are including in Part III.B.

[2] The Special Committee conducted an administrative hearing on the record in connection with Judge McBryde's Request for Assistance of the

Judge McBryde may be suffering from a mental or physical problem presented a delicate circumstance, because such a problem would mitigate against any finding the Special Committee might make regarding Judge McBryde's behavior. To supplement the judgment of the members of the Special Committee, Special Counsel submitted to an independent psychiatrist materials concerning Judge McBryde and asked for an expression of an opinion as to whether, based on these materials, the expert believed that a psychiatric examination of Judge McBryde was warranted. That expert reported his view that an examination was warranted. Out of an excess of caution rooted in concern for Judge McBryde, the Special Committee then approached, through Special Counsel, a second psychiatrist. He was furnished the same materials, and posed the same question, but he was not informed either of the fact that another psychiatrist had been presented with the same materials and asked the same question, or of the response. The second psychiatrist responded in the same fashion, indicating that a further examination was warranted.

After receiving the responses from the two independent psychiatrists that an examination was warranted, the Special Committee approached counsel for Judge McBryde to inquire whether Judge McBryde would consent to such an examination. Judge McBryde refused. His counsel countered that the materials that the Special Committee had referred to the two independent psychiatrists were misleading and incomplete. Out of an excess of caution, the Special Committee then separately submitted to the independent psychiatrists corrections and additional materials designated by Judge McBryde's counsel, including testimony given by Judge McBryde during a hearing before the Special Committee. After reviewing all the materials

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Judicial Council in connection with the assignment of two cases. At that hearing in October 1995, the Special Committee heard testimony from a federal judge, an Assistant U.S. Attorney and the Clerk of the Court for the Northern District of Texas, as well as Judge McBryde. That proceeding was distinct from the investigation pursuant to § 372(c), but facts adduced at that hearing formed the initial basis for the two concerns of the Special Committee set forth in the text.

as supplemented, the Special Committee received the same responses, independently, from the two experts — that an examination of Judge McBryde was warranted. In view of Judge McBryde's refusal to undergo such a examination, the Special Committee requested that the Judicial Council issue an order requiring that Judge McBryde be so examined. Judge McBryde requested and was given the opportunity to address the Judicial Council, urging that the order not issue. He objected on several grounds, including that due process required that he be able to challenge the factual predicate of the Special Committee's requested order (i.e., the factual bases for and the opinions of the two independent psychiatrists that a medical examination was warranted) before the Council could issue the order. On July 31, 1996, the Council entered an order requiring Judge McBryde to undergo such an examination. Judge McBryde again refused and commenced an action in the United States District Court for the Northern District of Texas seeking declaratory and injunctive relief that the investigation pursuant to § 372(c) was unconstitutional and that the Judicial Council's order that he undergo an examination was invalid because he had been denied due process in not being able to cross examine the psychiatrists. The Judicial Council thereupon commenced a proceeding in the same court pursuant to 28 U.S.C. § 332(d)(2) to enforce the order of the Judicial Council. Both of the proceedings in the District Court are under seal pursuant to § 372(c)(14).

When the Judicial Council's § 332(d) proceeding and Judge McBryde's complaint were filed, all of the District Judges in the Northern District recused themselves. Initially, Chief Judge Politz, pursuant to 28 U.S.C. § 292(b), appointed Judge Thomas M. Reavley to sit as a District Court Judge in these matters. Subsequently, Chief Judge Politz withdrew this order and, pursuant to the provisions of 28 U.S.C. § 291(b), sought an order from Circuit Justice Antonin Scalia designating a judge from within the Fifth Circuit to sit as a District Judge on these matters. Judge McBryde requested the appointment of a judge from outside the Fifth Circuit. Circuit Justice Scalia denied Judge McBryde's application and designated Judge Reavley to sit as the District Court Judge. Notwithstanding this designa-

tion, Judge McBryde moved to have Judge Reavley recuse himself, asserting, inter alia, that his friendship with, and his alleged dependence on continued certification by, Chief Judge Politz created the appearance of impropriety. Judge McBryde also argued that the sequence of events leading up to the appointment of Judge Reavley would "create suspicion" in the mind of a reasonable person that Judge Politz selected a judge whose views were consistent with his own and "then engaged in communications that led to the ratification of that selection by Justice Scalia." (Motion for Disqualification Pursuant to 28 U.S.C. § 455(a), dated Feb. 28, 1997, at 8.) Judge Reavley denied the motion to recuse, writing that the motion "bordered on the frivolous," and that "[t]hat border is crossed by the suggestion of tainted appearances in the designation by Justice Scalia." Judicial Council v. McBryde, Civ. Act. Nos. 4-96-CV-686; 3-96-CV-3043, slip op. at 2 (Mar. 21, 1997).

With the parties in the proceedings briefing for Judge Reavley numerous legal issues, the Special Committee became increasingly concerned over the delay in the Section 372(c) investigation and the expense of these proceedings, and the prospect of further delay and expense that would arise from appeals from any rulings by Judge Reavley. In order to address these concerns and to render moot Judge McBryde's due process objection underlying his attack on the Judicial Council's July 31 order, the Special Committee proposed to Judge Reavley: (1) that the Judicial Council stay its order; (2) that a different independent psychiatrist be appointed by the Special Committee to be present at the Special Committee's evidentiary hearing and to review all materials submitted therein; (3) that at the end of the presentation of evidence in the Section 372(c) hearing he be asked to express his opinion as to whether (a) Judge McBryde did not have a mental problem, (b) Judge McBryde did have a mental problem, or (c) he could not express an opinion either way but believed that a psychiatric examination was warranted based on the evidence the expert had heard. Judge McBryde, through counsel, would then have a full opportunity to cross-examine this expert as to the basis for his professional medical judgment, thus mooting Judge McBryde's due process argument to the procedure the Special Committee

had previously utilized. Judge Reavley accepted this proposal, stating that "[t]he Judicial Council has formed no conclusions about its investigation, and the Council's proposed proceeding reveals that no conclusions will be reached until after careful investigation." Judicial Council v. McBryde, Civ. Act. Nos. 4-96-CV-686; 3-96-CV-3043, slip op. at 1-2 (April 1, 1997). The Special Committee's § 332(d) proceeding and Judge McBryde's complaint for declaratory and injunctive relief are currently stayed in the District Court.[3]

Parallel with, but distinct from, this Section 372(c) investigation, Judge McBryde had commenced a mandamus proceeding against the Judicial Council seeking to overturn an order entered by the Council on October 20, 1995 declining to overturn the reassignment of two cases (United States v. Satz and Torres v. Trinity Industries, Inc.) from Judge McBryde's docket to Chief Judge Buchmeyer's docket. The matter was fully briefed and argued at the end of April 1996 and a decision rendered on July 2, 1997. In re McBryde, 117 F.3d 208 (5th Cir. 1997). This is not the occasion or forum for any expressions concerning that decision. As members of the Special Committee, and as members of the Judicial Council, we are acting here in an administrative, not a judicial, capacity. But that decision contained factual conclusions which affected this Section 372(c) proceeding. Two of the complaints against Judge McBryde (the Whiteaker complaint and the Hunger letter "deemed" a complaint) concerned the sufficiency of the record supporting findings by Judge McBryde that an Assistant United States Attorney ("AUSA") and Postal Inspector Whiteaker lied in Satz about the terms of a sealing order entered by United States District Judge Paul G. Rosenblatt of the District of Arizona. The Special Committee, sensitive to its roles and to its functions, determined not to hear evidence in this proceeding concerning the sufficiency of the record that was before Judge

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[3]As detailed later in this Report, after going through this procedure, Judge McBryde has not exercised what he contended was his due process right to cross-examine the expert's view that a mental examination was warranted.

McBryde in Satz, notwithstanding the Whiteaker and Hunger complaints.

During the period of delay in commencing evidentiary hearings occasioned by the foregoing litigation, the Special Committee and Special Counsel began to learn about more and more instances of allegations of repetitive, abusive and excessive conduct by Judge McBryde beyond the allegations in the five complaints. Pursuant to Section 28 U.S.C. § 372(c)(5) and Rule 9(A) of the Fifth Circuit Rules Governing Complaint of Judicial Misconduct or Disability, the Special Committee decided to broaden its investigation and later notified Judge McBryde of this decision. That entailed extensive investigation by Special Counsel of numerous other persons and proceedings involving Judge McBryde. This broadened investigation was made more difficult at times by, first, the reticence of potential witnesses to communicate with Special Counsel even concerning matters of public record, and, then, the reluctance and unwillingness of some with seemingly substantial allegations even to appear before the Special Committee. Such persons expressed fears of retaliation which the Special Committee now understands and believes are substantial. The basis for this conclusion is discussed later in the Report.

Finally, as the evidentiary hearing approached, the progress was hampered by Judge McBryde's mandamus petition concerning, in connection with this Section 372(c) evidentiary hearing, the issuance of subpoenas duces tecum and ad testificandum (and in what forum, the Special Committee or the Article III courts, disputes related thereto should be resolved). This matter was decided in In re McBryde, 120 F.3d 519 (5th Cir. 1997).

## III. THE EVIDENTIARY HEARINGS

The Special Committee conducted evidentiary hearings in New Orleans on August 25 through August 29, 1997 and in Fort Worth on September 29 through October 2, 1997. During the nine days of hearings, the Special Committee heard from fifty-five witnesses. The Special Committee received in evidence hundreds of exhibits, mostly court records and transcripts in matters before Judge McBryde. Among the witnesses presented by Special Counsel were four federal District Court Judges; one

Texas State Court Judge; a former U.S. Attorney for the Northern District of Texas; the Director of Enforcement of the Securities and Exchange Commission; the head of the Public Defender's Office in Fort Worth; Assistant U.S. Attorneys and Federal Public Defenders; the Clerk of the District Court for the Northern District of Texas; and private attorneys who practiced before Judge McBryde. Judge McBryde's witnesses included private and public attorneys who practiced before him; court personnel; employees of the General Services Administration ("GSA"); former members of juries which decided cases over which he presided; and present and former members of his staff.

## IV. FINDINGS OF FACT

The Special Committee heard evidence concerning various incidents dating from soon after Judge McBryde was appointed to the bench until very recently. In addition, the Special Committee heard testimony from many witnesses regarding their experiences during trials in Judge McBryde's court, which took place at various times during Judge McBryde's tenure on the bench. The following Findings of Fact are presented in roughly the chronological order in which they occurred and are followed by a separate discussion of Judge McBryde's trial practices, Judge McBryde's witnesses and evidence, and observations and conclusions which the Special Committee has reached.

### A. Discrete Incidents and Events

#### 1. Accusing the SEC of Bad Faith for Standing on a Principle (1991)

William McLucas, the Director of Enforcement at the Securities and Exchange Commission, testified regarding a 1991 case presided over by Judge McBryde styled SEC v. Gary R. Van Waeyenberghe. The allegation made by the SEC in the case was that a Mr. Schwartz and two other individuals had defrauded investors in connection with the sale of certain securities. The SEC was seeking injunctive relief as to several provisions of the federal securities law and disgorgement of any ill-gotten gain by the defendants.

In compliance with Judge McBryde's requirement that the parties attend a settlement conference, an SEC staff attorney and Mr. Schwartz met to discuss settlement. Negotiations stalled

because Mr. Schwartz refused to agree to any disposition of the case unless it was sealed. After the parties reported this to Judge McBryde, he issued an order directing that another settlement conference be held at which the SEC be represented in person by someone having full and complete authority to settle the case. This order presented a problem for the SEC because settlements typically required the approval of the Commissioners appointed by the President. The SEC therefore sought relief from Judge McBryde's order requesting that Judge McBryde permit a person with limited settlement authority to attend the settlement conference provided that the SEC make arrangements for an expedited approval process of any proposed settlement reached by the SEC representative and Mr. Schwartz. Judge McBryde responded to the SEC's request by requiring the SEC, prior to the scheduled settlement conference, to review the terms of Mr. Schwartz's settlement proposal and to send a representative with authority to settle on such terms to the settlement conference. In order to comply with Judge McBryde's order, the Commission passed a special resolution authorizing Mr. McLucas to settle the case if he thought it proper to do so.

Mr. McLucas met with the defendants to discuss settlement at the time appointed by Judge McBryde. One defendant, Mr. Schwartz, continued to oppose any settlement unless the disposition was sealed. Mr. Schwartz was willing to agree that such a disposition would be disclosed only if he participated in another public offering. Mr. McLucas, on behalf of the SEC, opposed sealing the disposition, despite Mr. Schwartz's agreement. Mr. McLucas explained that sealing such a disposition is fundamentally at odds with the disclosure premise underlying the federal securities laws and contrary to SEC policy and the SEC's deterrence objectives. Aside from the dispute over sealing, it was apparent that Mr. McLucas and Mr. Schwartz would be able to reach agreement with respect to the other terms of a settlement.

Mr. McLucas' report of the status of negotiations to Judge McBryde prompted the following exchange in which Judge McBryde found that the SEC had acted in bad faith:

"THE COURT: Okay. What I am hearing is he's offering to do whatever needs to be done to make disclosure to people that deal with him, offering to let me order him to do that, to make whatever disclosure the government reasonably could require to people that he's going to deal with.

Now, if the government still insists on a non — What are you calling it, sealing —

MR. McLUCAS: An open record.

THE COURT: — sealing of the record, with that in mind, then it has to be a matter of principle.

MR. McLUCAS: Oh, indeed, it is, Your Honor.

THE COURT: And just a matter of principle.

MR. McLUCAS: Your Honor, it is a matter of principle, and it is a matter of particular principle —

THE COURT: Okay. And I hope the government is not so nonsensical that it is going to stand on simply a matter of principle when the practical things that need to be accomplished can be agreed upon.

MR. McLUCAS: Your Honor, I agree. Your Honor is correct.

I believe we have compromised substantially, and the principle is critical to the enforcement program.

THE COURT: Well, but when you can get a settlement that accomplishes everything that reasonably needs to be accomplished, that ought to be enough in a particular case.

MR. McLUCAS: In a particular case, Your Honor. But I respectfully do not believe —

THE COURT: Well, do you have authority to waive that principle?

MR. McLUCAS: I do, Your Honor.

THE COURT: Okay. We're going to recess and let you all discuss this matter and come back at 1:30. There is no reason in the world for the court to be devoting time to something over where the only hangup is a matter of principle.

So we'll expect the parties to negotiate. You can break for 45 minutes for lunch; but otherwise, I want you to talk

about this. And we will be back in here at 1:30." (Exh. C-34, at 16-17.)

After additional negotiation, Mr. McLucas maintained the position that the SEC would not agree to sealing the disposition. Mr. McLucas reported the SEC's position to Judge McBryde, prompting the following exchange:

"THE COURT: What difference does that make on the issue we are talking about? The issue we are talking about is whether the public is better served by him being forced to make a disclosure by an order of this court, as opposed to there being a lawsuit pending in Fort Worth, Texas with him operating in Michigan.

MR. McLUCAS: Your Honor, in part, it goes to our belief in the credibility of the system, that we can rely on Mr. Schwartz to comply with the court's order and the injunction.

THE COURT: Well, what does that have to do with whether or not anybody would find out about this proceeding in Fort Worth, Texas?

MR. McLUCAS: Because it is fundamentally antithetical to the full-disclosure purposes which are the cornerstone of the federal securities laws for the SEC to agree to seal a court order in a public proceeding that we have brought —

THE COURT: I think the SEC is negotiating in bad faith. I think the SEC is in violation of the local rule that requires good-faith settlement negotiations.

Now, I suggest you all go out there and talk. I'm going to give you to 3:00 o'clock. We're going to talk some more. We are going to get this thing resolved.

MR. McLUCAS: Respectfully, Your Honor, if I might, we have not negotiated in bad faith.

THE COURT: I consider that you are negotiating in bad faith. And I want further negotiations, and I want a report back at 3:00 as to where you are at that time." (Exh. C-34, at 22-23 (emphasis added).)

During the ensuing recess, Mr. McLucas, his local counsel and the SEC General Counsel's Office discussed contingencies to deal with the possibility that Mr. McLucas might be found in

contempt and incarcerated by Judge McBryde for his refusal to agree to the sealing of the final disposition.

When the parties returned to Court and reported that the status of the negotiations remained the same, Judge McBryde, sua sponte, ordered the case sealed. He subsequently unsealed all aspects of the case, except for the final disposition and the transcript of the proceedings at which such order issued. The SEC appealed Judge McBryde's sealing order. The Fifth Circuit reversed Judge McBryde's sealing of the final disposition and transcript and noted that there was no evidence of bad faith on the SEC's part. See SEC v. Van Waeyenberghe, 990 F.2d 845, 849 & n.5 (5th Cir. 1993).

As is reflected infra, findings of "bad faith" and questioning the integrity of lawyers proved to be a pattern in Judge McBryde's court during the ensuing years and, indeed, have continued to the present.

2. Turner I (May to July 1992)

The Special Committee heard evidence concerning an episode in which Judge McBryde called Assistant Federal Public Defender Tim Henry incompetent or, alternatively, insinuated that he was lying, and then went on to state in open court that the entire Federal Public Defender's Office had been less then candid with him.

The events giving rise to this incident were described by Mr. Henry. Mr. Henry represented Patrick Leon Turner in a criminal matter which was set for trial on Monday, May 11, 1992. Mr. Turner decided to change his plea the week before the trial was to begin. On Wednesday May 6, Judge McBryde's chambers informed Mr. Henry that Judge McBryde had set the re-arraignment hearing for the next day, May 7, at 9:00 AM.

Mr. Henry attempted to reach Mr. Turner at home to inform him of the court hearing. Mr. Turner was not at home, but Mr. Henry left word with Mr. Turner's wife to have Mr. Turner call him. Mr. Henry also attempted unsuccessfully to contact Mr. Turner at his place of employment (a radio station) several times throughout the day on May 6. Prior to the scheduled hearing the next morning, Mr. Henry again attempted to reach Mr. Turner at home. Mr. Turner had already left for work and Mrs. Turner informed Mr. Henry that she had

forgotten to tell Mr. Turner that Mr. Henry had called the previous day.

At the May 7 hearing, Mr. Henry explained to Judge McBryde why Mr. Turner was not present — that he had not been able to reach Mr. Turner despite his repeated efforts and that Mr. Turner was therefore unaware of the court date. Mr. Henry explicitly told Judge McBryde that he had not told Mr. Turner's wife of the court date, but only asked her to tell Mr. Turner to call him.

Judge McBryde rescheduled the hearing for the next day and ordered Mr. Turner arrested. At the May 8 hearing, Mr. Henry again explained to Judge McBryde that Mr. Turner's failure to appear at the May 7 hearing was unintentional as he was unaware of the court date. Mr. Henry reiterated that he had not told Mr. Turner's wife of the court date. Judge McBryde ordered Mr. Turner remanded to custody pending sentencing.

At the July 17, 1992 sentencing hearing, the issue of Mr. Turner's failure to appear on May 7 again surfaced regarding whether Mr. Turner would receive an upward enhancement of his sentence for obstruction of justice. This depended on whether his failure to appear on May 7 was intentional. Mr. Henry, as he had on May 7 and May 8, told Judge McBryde that Mr. Turner's failure to appear was unintentional as he had no knowledge of the court date. Mr. Henry reiterated that he had never told Mrs. Turner of the court date. In addition, Mr. Henry put Mrs. Turner on the witness stand, and she corroborated under oath that Mr. Henry had only asked her to tell Mr. Turner to call him, but had not mentioned a court date, and that she had forgotten to relay the message to him.

Despite being told on three separate occasions by Mr. Henry that he had not told Mrs. Turner of the court date and despite hearing corroborating testimony to that effect from Mrs. Turner, Judge McBryde's response revealed his conclusion that he was being deceived:

> "THE COURT: Okay. Mr. Henry, I simply don't believe you. I believe you told that lady that, if she talked to her — you told her that this man was scheduled to be sentenced. And I'm giving you the benefit of the doubt. I am assuming that you have forgotten what you told her.

You are not totally incompetent, and you would have to be totally incompetent not to tell that man's wife that his sentencing was scheduled the next day.

Okay. I find that the defendant did obstruct justice by not appearing for the hearing that was scheduled in this case." (Exh. C-21, at 40.)

In addition to accusing Mr. Henry in open court of lying,[4] Judge McBryde went on to accuse all the members of the Federal Public Defender's Office of lacking integrity, stating:

"THE COURT: I have perceived on more than one occasion recently that members of the Federal Public Defender's Office are less than candid with the court, and I am not going to tolerate that. And I am conveying the message to you, and I hope that you help convey the message to the others." (Id. at 48.)

Mr. Henry's testimony before the Special Committee evidences the demoralizing impact such treatment understandably has on officers of the court whose careers are jeopardized when their integrity is called into question by a federal judge. Judge McBryde testified that he thought his public statement accusing an entire office of dedicated professionals of being dishonest was the best way to send a message to the office. Judge McBryde presented no persuasive evidence to support his charge of office-wide dishonesty.

3.. Saulsberry Sanction (July to November 1992)

The Special Committee received evidence of Judge McBryde's sanctioning of an in-house counsel, Belinda Saulsberry, in a case styled Sims v. ANR Freight System and Robert Hembling. This incident is most disturbing to the

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[4]Judge McBryde confirmed during the hearings that he believed Mr. Henry had lied, not that he was forgetful or incompetent. When asked what possible motive Henry would have to lie to him, Judge McBryde suggested "to protect his client." (McBryde, TR: 1095.) The Special Committee does not find it plausible that Mr. Henry, a public defender who must appear repeatedly before Judge McBryde and who is assigned impoverished clients at random, would lie to Judge McBryde under these circumstances. If Mr. Henry lied at that time, he would have perjured himself before this Committee. We believe that Mr. Henry told the Special Committee the truth in his testimony.

Special Committee and, in its view, reflects a gross abuse of power and a complete lack of empathy. There is no rational justification for Judge McBryde's behavior in this matter.[5]

Ms. Sims and her ten-year old daughter, Shaleen Day, sued ANR Freight System and one of its employees, Robert Hembling, alleging sexual harassment, retaliation, assault and battery, negligence, gross negligence and intentional infliction of emotional distress. Ms. Saulsberry represented both ANR and Mr. Hembling. The complaint in this matter alleged, inter alia, that Mr. Hembling had waited (on two separate occasions) for Ms. Sims to leave home and then placed a telephone call to Shaleen (the ten-year-old girl) in which he told her that he would kill her mother and rape her if her mother did not drop the charge of discrimination and sexual harassment against him at work.

Although Judge McBryde had issued his standard pretrial order in the case which required the parties, including principals, to attend settlement conferences, Ms. Saulsberry did not bring Mr. Hembling to the first settlement conference. As she explained to Judge McBryde at a subsequent hearing, she understandably believed that Mr. Hembling's presence would be counter-productive to the goal of reaching settlement because of the nature of the allegations in the case. In addition, Mr. Hembling had no assets and had given Ms. Saulsberry full authority to settle the case.

After the settlement conference occurred, the parties filed a Joint Status Report with Judge McBryde which provided, in part, a summary of the allegations being made by the plaintiffs. One of the allegations recounted in that report that was not specifically mentioned in the complaint was that Mr. Hembling

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[5] Betty Springer, Ms. Saulsberry's local counsel, was subpoenaed to testify on Judge McBryde's behalf. The purpose of her testimony escapes the Special Committee, as she offered no opinion or evidence regarding Judge McBryde's treatment of Ms. Saulsberry. In fact, she signed a brief, along with Ms. Saulsberry, endorsing the decision of Ms. Saulsberry that gave rise to the humiliating sanction imposed on Ms. Saulsberry by Judge McBryde.

had terrorized the 10-year-old Shaleen Day by popping out his glass eye and putting it in his mouth in front of her.

At a hearing after the filing of the Joint Status Report, Judge McBryde interrogated Ms. Saulsberry as to why Mr. Hembling was not present at the settlement conference. The following excerpt depicts the deplorable manner in which Judge McBryde treated Ms. Saulsberry:

"THE COURT: Okay. Why don't you tell me why Mr. Hembling was not at the settlement conference that was held at an earlier date?

MS. SAULSBERRY: Your Honor, Mr. Hembling has no money, and he indicated to me that he had no money and had no assets from which to contribute towards settlement negotiation. He authorized me, on behalf of him and the company, to settle this case.

And we believed that, based upon the fact that he did not have any money — and we had been at a deposition of the plaintiffs, and Mr. Hembling was not asked to attend. And the reason I didn't ask him to attend the deposition is because we have a minor plaintiff, and I wanted to give her full consideration. The allegations —

THE COURT: No. I am not asking about depositions. I am asking about why didn't he attend the settlement conference?

MS. SAULSBERRY: That was —

THE COURT: Let me find the report on that settlement conference.

Apparently it was one that was held —

MS. SAULSBERRY: May 1st.

THE COURT: Was it when?

MS. SAULSBERRY: May 1st, Your Honor.

THE COURT: Okay. And we have a report on that that was filed as part of the joint status report on May 5. I just want to know why he didn't attend that.

Did you tell him he didn't have to be there?

MS. SAULSBERRY: No, I didn't tell him he didn't have to be there. I just told him that we were going to talk with the plaintiffs and we were going to see what their

settlement offer was and that we would represent him at that time.

THE COURT: Did you seek any relief from my order that ordered him to be there?

MS. SAULSBERRY: No, sir.

THE COURT: By what line of reasoning did you conclude that you had the right to tell him to violate my order?

MS. SAULSBERRY: Your Honor, I did not think I was violating your order. I was trying to comply with it as best that we could and felt that Mr. Hembling's presence would not facilitate the negotiations. It is not an intentional noncompliance.

THE COURT: Well, what did you think I meant in my order when I said that each party would appear in person at the settlement conference?

Let me find the exact orders.

Said parties and their counsel shall participate in person and not by telephone or other remote means.

What did you think that meant?

MS. SAULSBERRY: Your Honor, I thought that we were complying with the spirit of the order in trying to —

THE COURT: What did you think that meant?

MS. SAULSBERRY: It meant that everybody should be present, Your Honor. At the same time that I read it, though, I —

THE COURT: Did you have a hard time understanding it?

MS. SAULSBERRY: No, sir.

THE COURT: I recently had this problem, and the lawyers ended up taking a reading comprehension course.

MS. SAULSBERRY: Yes, sir.

THE COURT: And I think we are going to do that again.

MS. SAULSBERRY: Yes, sir.

THE COURT: So you are ordered to attend 15 hours of a reading comprehension course, and I want — well, we'll enter a formal order on that.

MS. SAULSBERRY: Yes, sir.

THE COURT: Because we have to understand what the orders of the court say.

Do you understand that?

MS. SAULSBERRY: I understand." (Exh. C-89, at 8-10.)

As the above excerpt reflects, Judge McBryde sanctioned Ms. Saulsberry by requiring her to attend fifteen hours of a reading comprehension course and to submit an affidavit swearing to her compliance. Locating a course that would meet the requirements of this order proved quite difficult and Ms. Saulsberry eventually had to file an affidavit seeking additional time to comply with Judge McBryde's order because she was unable to identify an appropriate program. Ms. Saulsberry eventually located a course meeting Judge McBryde's requirements. She took the course and then submitted an affidavit describing the course and stating that she attended it three hours a week over a five-week period.

Judge McBryde was not satisfied. On November 16, 1992, he entered an order requiring Ms. Saulsberry to file a supplemental affidavit listing "each day that she was in personal attendance at a reading comprehension course in compliance with [the] court's order; the place where she was in attendance on each date; the course title of each course; how long she was in attendance on each day; and the name of a person who can verify her attendance for each day listed." (Exh. C-94.) To comply with Judge McBryde's order, Ms. Saulsberry was forced to submit an excruciatingly detailed affidavit. The only rationale Judge McBryde could offer for requiring Ms. Saulsberry to submit to such a humiliating procedure was that he thought her initial affidavit was "not a direct statement that she attended the course." (McBryde, TR: 2135.)

No more need be said with regard to this incident.

4. Peter Fleury Scheduling Conflict (July 1992)

One incident, itself fairly trivial but along with other incidents illustrative of a pattern of conduct, involved a hearing before Judge McBryde on July 17, 1992. There, Assistant Federal Public Defender Peter Fleury was scheduled to appear at a complicated sentencing hearing before Judge McBryde at the same time he was scheduled to appear at a routine arraign-

ment before Judge Terry Means. Mr. Fleury's secretary called Judge McBryde's chambers a few days before the hearings to arrange for Mr. Fleury's sentencing hearing to be taken at the end of the docket, so that he could first attend to the routine arraignment before Judge Means. While Mr. Fleury was under the impression that such an arrangement had been made, Judge McBryde's court coordinator, Barbara Garner, informed the Special Committee that no arrangement had been made and that she told Mr. Fleury's secretary that Judge McBryde takes cases in whatever order he pleases so that no guarantee could be made.

Believing the arrangement had been made, Mr. Fleury proceeded to Judge Means' courtroom on the morning of July 17. Meanwhile in Judge McBryde's courtroom, Judge McBryde called Mr. Fleury's sentencing matter as the first case. Since Mr. Fleury was not present, Judge McBryde called upon Assistant Public Defender Tim Henry to represent Mr. Fleury's client. Mr. Henry explained to the Special Committee that this was a complicated sentencing matter with which he was not familiar and accordingly he did not feel comfortable representing Mr. Fleury's client in the matter. After consulting with the client, Mr. Henry informed Judge McBryde that the client wanted to wait for Mr. Fleury. Notwithstanding the client's wishes, Judge McBryde decided to commence the proceeding, stating that "hopefully Mr. Fleury will be here before we get to the parts that would require any discretion." (Exhibit C-13, at 4.) Mr. Henry had also explained to Judge McBryde that he understood that Mr. Fleury was currently appearing before Judge Means and that the proceeding there would be quite short. Rather than calling another matter on the docket when it became apparent that Mr. Fleury was engaged before Judge Means, Judge McBryde first decided to proceed with the Holloway case in Mr. Fleury's absence and then elected to make all the parties stand at the podium while he awaited reports as to Mr. Fleury's status from Assistant Public Defender Amy Seidman, who had gone to Judge Means' courtroom.

After a short period of time, when Ms. Seidman had not returned, Judge McBryde asked AUSA Fred Schattman to check on her. In AUSA Schattman's absence, Ms. Seidman returned

to Judge McBryde's courtroom and reported that Mr. Fleury was engaged in proceedings before Judge Means. Judge McBryde then asked her to go back to Judge Means' courtroom to monitor what was going on with Mr. Fleury's proceedings. Mr. Henry described the atmosphere in Judge McBryde's courtroom while awaiting the status reports as to Mr. Fleury's proceedings before Judge Means as extremely tense. After some period of time, Judge McBryde indicated he was going to take up another matter, but that it was "inexcusable on the part of the Federal Public Defender to conduct themselves this way." (Exhibit C-13, at 6-7.) AUSA Schattman then arrived and told Judge McBryde that "Judge Means interrupted his proceedings with Mr. Fleury to allow Mr. Fleury to come up here." (Exhibit C-13, at 7.)

During this same time period, in Judge Means' courtroom, AUSA Schattman and Ms. Seidman, one after the other, had approached Mr. Fleury to tell him that Judge McBryde had called the Holloway case. Judge Means observed both of them approach Mr. Fleury. After the second interruption, Mr. Fleury explained to Judge Means that he was needed in Judge McBryde's courtroom. Judge Means interrupted his proceeding to allow Mr. Fleury to go to Judge McBryde's courtroom, commenting that he did not want to "get [Mr. Fleury] in trouble with Judge McBryde." (Exhibit C-14, at 4.)[6] Mr. Fleury arrived in Judge McBryde's courtroom shortly thereafter, and Judge McBryde told him that his behavior was "inexcuseable." (Exhibit C-14, at 7.)

Ms. Garner testified that Judge McBryde is generally accommodating to the schedules of lawyers.[7] While we have no

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[6] Mr. Fleury explained his dilemma to the Committee: "I didn't want to aggravate Judge Means and let him think that I had less deference to him than any other judge. At the same time, I didn't want Mr. Holloway to be underrepresented in an important sentencing hearing, so I explained to Judge Means that Judge McBryde wants [sic] me upstairs." (Fleury, TR: 238.)

[7] According to Ms. Garner: "If [lawyers] call me and say they have a conflict, many times I've gone to Judge McBryde and I will say, 'So-and-so has a conflict. Can we put him at the first or put him at the end,' depending on his conflict at the time, and he has never told me anything but, yes, we

reason to dispute Ms. Garner's testimony in this regard, it is apparent that Judge McBryde was not accommodating to Mr. Fleury in this instance.[8] In addition, as is discussed in more detail infra, Ms. Garner's testament to Judge McBryde's flexibility in scheduling matters is not consistent with Judge McBryde's conduct in other matters such as Judge Lowe incident (Part III.A.13) or the Burgos case (Part III.A.17). Together, these incidents raise serious questions about Judge McBryde's willingness to accommodate scheduling conflicts and difficulties.

5. Fourth Floor Order (October 1992 to February 1994)

The Special Committee heard evidence of Judge McBryde's sanctioning all the attorneys in the Federal Public Defender's Office because one attorney, Assistant Tim Henry, was not reachable for approximately forty-five minutes when he was told the jury had recessed for lunch.

On October 23, 1992, Mr. Henry was representing a criminal defendant in a trial before Judge McBryde. At the conclusion of the evidence, the jury retired to conduct its deliberations. Judge McBryde had instructed the attorneys to be close enough to return in five minutes should he receive a note from the jury. At approximately 11:55 AM, Mr. Henry telephoned Judge McBryde's chambers to inquire if the jury was intending to deliberate through lunch. Judge McBryde's clerk informed Mr. Henry that the jury had decided to take lunch and would be gone for approximately one hour. Based upon that information, Mr. Henry himself went to lunch, but he did not leave a number with his office where he could be reached. Contrary to what Mr. Henry had been told, the jury decided not to take lunch, continued its deliberations, and reached a verdict. Because Mr. Henry could not be reached, the Court and the other parties had to wait approximately forty-five minutes until

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will do this or that." (Garner, TR: 1944.)

[8] Perhaps we will never know why Judge McBryde called Mr. Fleury's case first that morning. According to Ms. Garner, Judge McBryde ordinarily would have taken sentencing matters last.

another assistant public defender could be found to fill in for Mr. Henry and to receive the jury's verdict.

When Mr. Henry returned from lunch and learned that the jury had reached a verdict, he rushed to Judge McBryde's courtroom. In open court, Judge McBryde called Mr. Henry and Mr. Paul Stickney (the other Assistant Public Defender whom Judge McBryde had found to take the verdict) to the bar. Judge McBryde questioned Mr. Henry as to why he had been unreachable. Mr. Henry explained that he had gone to lunch after being told by the judge's clerk that the jury would be taking lunch for approximately one hour. Mr. Henry also apologized to the Court for failing to leave a number where he could be reached.

Notwithstanding the explanation, Judge McBryde ordered that not only Mr. Henry but also every Public Defender in the office should remain on the fourth floor of the courthouse throughout jury deliberations in any case before him, including during a lunch break or recess, and he ordered Mr. Henry to so inform his colleagues in the office by written memorandum with a copy to the Court. In Judge McBryde's own words:

> "THE COURT: I am not going to take any other action at this time other than to instruct you to get a memo to every member of the Federal Public Defender's Office that at no time while the jury is deliberating in my court—from beginning to end; during lunch hour, recesses or anything else—is that attorney to leave the fourth floor of this courthouse. And I want a copy of it.
>
> MR. HENRY: Thank you, Your Honor.
>
> THE COURT: And that will be the general rule. Don't ask for any exceptions. And no other member of the Federal Public Defender's Office is to ask for an exception. That will be the rule. From the time the jury leaves this courtroom to start deliberating until the jury returns a verdict the attorney will be on the fourth floor of this courthouse." (Exh. C-22, at 5.)

Judge McBryde's clear directive that no attorney was even to request an exception to the Fourth Floor Order had its intended deterrent effect until February of 1994, some sixteen months later. At that time, Mr. Stickney had to try two criminal

cases on the same day before Judge McBryde. In order to prepare witnesses in the second case, Mr. Stickney asked Judge McBryde to lift the Fourth Floor Order in the first case.[9] Judge McBryde granted Mr. Stickney's request by lifting the Fourth Floor Order completely, stating he was optimistic that members of the Public Defender's Office would be responsive to the necessity of being readily available at all times for appearance in the courtroom or conference with the court during jury deliberations on a basis that will not cause any delay in the proceedings. Like the Fourth Floor Order itself, the rescission order is odd in that it seems to suggest that all the attorneys in the Federal Public Defender's Office had at some point been unresponsive to the necessity of being readily available during jury deliberations. That is simply not the case. The only Public Defender who could even arguably be said to have been unresponsive to the "necessity" identified by Judge McBryde was Mr. Henry, who had simply gone to lunch when he had been told that the jury was also going to lunch.

Judge McBryde's testimony concerning the Fourth Floor Order is as troubling as the order itself. He testified that he intended to punish Mr. Henry through the imposition of the

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[9]Judge McBryde submitted certain information relating to the lifting of the Fourth Floor Order at the time of the York and Coats cases. It appears that both Mr. Stickney and Judge McBryde incorrectly recalled that the motion to lift the order came when the jury was deliberating in York, when in fact it occurred earlier in the day, before those deliberations started. The conclusion to be drawn remains the same, viz., Stickney made the motion to lift the order only when he faced a second trial before Judge McBryde which overlapped jury deliberations in the first trial before Judge McBryde. In those circumstances, Stickney could not remain on the Fourth Floor and also meet with witnesses, including the defendant, and otherwise be prepared for the second trial. Judge McBryde's grant of Mr. Stickney's request in the York case also indicates that Judge McBryde had been contemplating the Fourth Floor Order, which he had entered some sixteen months earlier. (Exhibit FFO 27 ("Well, I've been thinking about changing that order and limiting it to only one member of the staff, and so I will do that as of now.") This runs counter to Judge McBryde's recollection in his testimony before the Committee in which he stated: "[The Fourth Floor O]rder probably went out of my mind because I'm not sure I had any consciousness of it until Mr. Stickney raised the question." (McBryde, TR: 2068-2069.)

order on his colleagues who had done nothing even arguably warranting a sanction. Judge McBryde rationalized his action against Mr. Henry's colleagues by telling the Special Committee that he viewed the Fourth Floor Order as a "favor" to the attorneys in the Public Defender's Office in that it forced them to do what they should be doing on their own. (McBryde, TR: 2164.) He also stated that he thought the order was fair under the circumstances.

The Fourth Floor Order had its intended punitive effect on Mr. Henry. He was understandably humiliated and embarrassed by these events because his actions resulted in hardship for his colleagues. Mr. Henry told the Committee:

> "I felt like a little kid, first of all, like I was being punished. I did stay on the fourth floor, but I also felt that I had caused my colleagues to be placed under this order, as well, so I felt pretty small, I think, by having to put them through this as well, but I accepted my punishment. I religiously stayed on the floor every other time that I had a trial." (Henry, TR: 303.)[10]

Indeed, as a consequence of this and other experiences with Judge McBryde, Henry left the Public Defender's Office in Fort Worth.[11]

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[10] Ira Kirkendoll, the Federal Public Defender, and his First Assistant, Paul Stickney, characterized the effect of the Fourth Floor Order on the attorneys as humiliating and making them feel like children.

[11] The testimony of Randy Harris, a court security officer and witness for Judge McBryde, seemed to be intended to suggest that Public Defenders went to lunch and did not remain on the Fourth Floor during lunch breaks and recesses during the sixteen-month period in which the Fourth Floor Order was in effect. As an initial matter, Mr. Harris did not actually become the full-time court security officer for Judge McBryde until March 1994 — a point after the Fourth Floor Order had been lifted. Furthermore, while Mr. Harris indicated that he had occasionally worked as a security officer for Judge McBryde prior to this point, he was unable to name a single Public Defender who actually left the fourth floor in violation of Judge McBryde's order.

Mr. Harris' testimony resulted in the post-hearing filing of affidavits by three Assistant Public Defenders who had tried cases before Judge McBryde during the relevant time period. In these affidavits, they affirmed

6. Anderson (November 1992 to August 1994)

The Special Committee took notice at the hearings of two Fifth Circuit decisions arising from United States v. Bobby J. Anderson: No. 92-1979, slip op. (5th Cir. Jan. 27, 1994) and No. 94-10817, 70 F.3d 353 (5th Cir. 1995).

In January 1992, Bobby J. Anderson was indicted on four drug-related counts. In March 1992, Anderson's attorney and the government prosecutor, AUSA Frederick Schattman, executed a Memorandum of Understanding, which provided that Anderson would provide information to the government and that, after evaluating this information, the government would "make some nature of a plea offer." The Memorandum also provided that if Anderson rejected the government's offer "no statements made by [Anderson] in the interview will be used against him in any criminal trial" except to impeach inconsistent testimony.

On May 11, 1992, the government issued superseding information charging Anderson with money laundering. On the same day, Anderson pled guilty to the charge. In the plea agreement, the government promised to dismiss the January indictment if Anderson complied with the terms of the plea (which required him to cooperate with and testify for the government). The District Court accepted Anderson's guilty plea and eventually set a sentencing hearing for October 30, 1992.

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their belief (supported by the order itself) that they were to remain on the fourth floor, without exceptions, throughout the course of jury deliberations, and that they did so, including during any recess or lunches that may have been taken. They had no specific recollection as to whether or when lunches or recesses were taken in specific cases. Counsel for Judge McBryde has submitted material indicating that it is unlikely that the jury recessed or broke for lunch in certain of the relevant cases. With all due respect to the effort expended by counsel for Judge McBryde in this regard, the Special Committee notes that whether, in fact, juries broke for lunch or took recesses in particular cases is of secondary importance. Judge McBryde could not have known when he issued the order that juries in cases before him involving Public Defenders would not take lunch breaks. Also, this does not change the demoralizing effect the order had on the Public Defender's Office.

At the October 30 hearing, Judge McBryde expressed his concern that the guidelines range for the money laundering conviction would be substantially lower than the range if the defendant had been convicted of the charges contained in the indictment. He announced that he was not accepting the plea agreement and offered to let Anderson withdraw his guilty plea to the money laundering charge.[12]

Following the hearing, AUSA Schattman sent a letter to Anderson's counsel stating that if Anderson persisted in his guilty plea on the money laundering charge, the government would move to dismiss the other counts of the indictment. Anderson decided not to withdraw his plea.

On November 12, 1992, AUSA Schattman filed a motion to dismiss the January indictment, explaining that Anderson's cooperation with government investigators and testimony "was of significant benefit . . . and critical importance" in four criminal prosecutions. No. 92-1979, slip op. at 7 (quoting motion). In particular, Anderson had been a key witness in the trial of Willie Hugh Morris, a major drug dealer in the Fort Worth area. Dismissal of the indictment was also important for the credibility of the government in future negotiations with potential cooperating witnesses. As explained by former AUSA Michael Sanders, who assisted AUSA Schattman on the Anderson case:

> "Because of Mr. Anderson's cooperation, we had entered into an agreement with him. He had lived up to this end of the agreement. Had the government not lived up to their end of the agreement, then we would have lost credibility

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[12] Probation officer Candice Story worked on the Anderson matter with Judge McBryde. She testified that she told Judge McBryde that there was a "red flag" relating to the plea agreement, in that under the agreement Anderson was not pleading to any of the counts in the January 1992 indictment, but was instead pleading to a money laundering count that arose several years prior to the conduct identified in that indictment. (Story, TR: 1252-53.) When asked by Judge McBryde why she thought this had occurred, Story noted that the defendant was the nephew of a DEA agent in the area. Story did not know whether in fact this relationship had had anything to do with the plea agreement, however.

> with future people that wanted to assist the government in subsequent investigations." (M. Sanders, TR: 900.)

The ultimate decision to file the motion to dismiss the January indictment was made by Marvin Collins, the U.S. Attorney for the Northern District of Texas.

On November 13, 1992, Judge McBryde convened a hearing and denied the motion. In the course of this hearing, he repeatedly attacked the integrity of AUSA Schattman and suggested that the decision to seek dismissal of the January indictment was motivated by the "special relationship" between Schattman and A.C. Anderson, a DEA agent who was the uncle of the accused. The Fifth Circuit summarized the hearing as follows:

> "At the end of the November 13th hearing and at a subsequent hearing, the district court expressed extreme displeasure with Schattman indicating that the government had attempted to usurp the district court's prerogative to reject the plea agreement. The district court suggested the possibility that Anderson had received lenient treatment because his uncle works with the Drug Enforcement Agency task force and Schattman." 70 F.3d at 354.

In a subsequent hearing the same day, Judge McBryde ordered the U.S. Attorney, Marvin Collins, to appear personally. He ordered Collins to appoint a new prosecutor to try the original indictment.

Judge McBryde never asked Collins whether he was consulted in the decision to seek dismissal of the indictment. If he had so inquired, he would have been told that Collins himself, not Schattman, made the ultimate decision to seek dismissal of the indictment and that the relationship between Schattman or Anderson and Anderson's uncle played absolutely no role in this decision.[13]

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[13] Gartner was the Executive Assistant to Collins at the time and was "consulted by Mr. Collins on most of the key decisions, most of the important decisions, that went on in the office" — including the decision to seek dismissal of the January indictment of Anderson. (Gartner, TR: 1299-1300.)

At this point, the government sought an order staying the trial and a writ of mandamus requiring Judge McBryde to dismiss the January 1992 indictment. The Fifth Circuit granted the motion to stay and, in January 1994, ordered that a writ would issue unless the indictment was dismissed within thirty days. In this opinion, the Fifth Circuit rejected evidence of alleged "bad faith" on the part of the government. In particular, the court rejected Judge McBryde's contention that the October 30 letter from Schattman to Anderson's counsel constituted a "secret deal" contrary to the public interest. Instead, that court found that the assurance contained in the letter that the government would move to dismiss the indictment was based upon "legitimate considerations," including Anderson's past cooperation and his willingness to testify in future cases. No. 92-1979, slip op. at 8. The Court also found that the "special relationship" cited by Judge McBryde between AUSA Schattman and Anderson's uncle was not implicated in the government's decision to dismiss the indictment and did not support any conclusion that this decision was contrary to the public interest. Id. at 9-10.

In response to the Fifth Circuit decision, Judge McBryde dismissed the January 1992 indictment of Anderson. The sentencing process then resumed before Judge McBryde. In the course of this process, Judge McBryde took the position that any information provided by Anderson pursuant to the March 1992 Memorandum of Understanding prior to the execution of the formal plea agreement in May 1992 could be taken into account for the purpose of an upward departure in sentencing. The government and Anderson took the position that the March 1992 Memorandum of Understanding and the plea agreement prevented this information from being taken into account.

Judge McBryde ultimately decided to take the information into account, holding that there was "absolutely no legal basis" for the government's contention that the debriefing information Anderson provided pursuant to the Memorandum of Understanding could not be used against him at sentencing. Judge McBryde also took the occasion to attack AUSA Schattman's integrity again, expressing his belief that AUSA Schattman had deliberately misled the court concerning the nature of the

government's agreement with Anderson and his "relationship" with Anderson's uncle. 70 F.3d at 355-56.

Anderson appealed his sentence and the Fifth Circuit vacated the sentence and remanded the case to another district judge. Id. at 357.

As noted, the Fifth Circuit rejected Judge McBryde's allegations of bad faith against AUSA Schattman — in particular, his suggestion that Schattman was improperly motivated by the fact that Anderson's uncle was a DEA agent.

The Special Committee considers this case relevant because it is an example of a disturbing pattern on Judge McBryde's part of making devastating allegations of deceit and bad faith against attorneys who disagree with him. In Anderson, the U.S. Attorney's Office cited a number of reasons for seeking the dismissal of the indictment. Judge McBryde did not just disagree with these reasons; instead, he went on to conclude that they were a subterfuge and that the decision was made in bad faith. Similarities with the Van Waeyenberghe case are clear. As explained below, in the years following Anderson, additional examples arose.

7. Dawson (March 1993)

In Dawson v. United States, 4:92-CV-144-A, a federal prisoner (Johnnie Dawson) brought a claim under the Federal Tort Claims Act ("FTCA") based upon injuries he sustained when he ran into a pole while chasing a fly ball during a prison softball game.

AUSAs R. Wayne Hughes and Civil Division chief Claude R. Brown met with Dawson on two occasions (August 10, 1992 and February 22, 1993) to discuss settlement. A report was filed describing these meetings and stating that Dawson made a settlement offer, but the government declined to make a counter-offer. Hughes and Brown ultimately identified a number of reasons for refusing to make a monetary settlement offer to Dawson, including: (1) that the government had a summary judgment motion pending, (2) that they believed that the suit lacked merit and was frivolous; and (3) that they wanted to discourage other suits by prisoners (a "very litigious group"). 68 F.3d at 890-91.

On March 4, 1993, a pretrial conference was held. Dawson did not show up for this conference, but Judge McBryde took the opportunity to question Hughes about the settlement efforts and about the pending summary judgment motion. In this motion, the government had relied, in part, upon a Texas statute, Tex. Civ. Practice & Rem. Code § 75.001 et seq., which provides that a landowner who makes his property available for recreational use is liable only if he has been grossly negligent or acted with malicious intent or bad faith. Judge McBryde ultimately rejected this argument and concluded that the prison's duty of care was established by a federal statute, 18 U.S.C. § 4042.

Judge McBryde also asked Hughes a number of questions about the merits of Dawson's claims. The Judge went on to state that:

> "If this was a suit involving a private party, as opposed to the government, it would be a very serious liability suit. And I guess the only reason the government doesn't consider it to be a serious liability suit is it doesn't take things seriously a lot of the times when it should. . . . I don't think you have acted in good faith. I think you have acted in bad faith." (Exh. C-108, at 17 (emphasis supplied).).

Judge McBryde then set a hearing for March 11, 1993 for (1) Dawson to show cause why he should not be sanctioned for failing to attend the March 3 conference; and (2) the government and its counsel to show cause why they should not be held in contempt for failure to comply with Local Rule 9.1(a) concerning the duty to make a good-faith effort at settlement.

A hearing was held on March 11. Dawson again failed to show up for the scheduled hearing. Notwithstanding the fact that Dawson had evidenced his lack of interest in his complaint by not having shown up for two hearings,[14] Judge McBryde went on to hold an extensive hearing, the transcript of which is

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[14] Following this hearing, Judge McBryde issued an order to Dawson to file an affidavit explaining why he had failed to show up for the pretrial conference or the show cause hearing. Dawson failed to make any such filing, and his case was dismissed with prejudice on March 23, 1993.

144 pages long and which is estimated to have lasted several hours. In the course of the hearing, Judge McBryde questioned AUSAs Hughes and Brown in detail about such subjects as the merits of Dawson's claim, their reasons for not making a monetary settlement offer to Dawson, and the basis for the government's summary judgment motion.

At the end of the hearing, Judge McBryde concluded that the explanations of Hughes and Brown for failing to make a settlement offer to Mr. Dawson were "unworthy of belief" and "frivolous and in bad faith." (Exh. C-99, at 138.) According to Judge McBryde, the government had "stipulated enough facts [that] a fact finder could find the government liable from those stipulated facts." (Id. at 136.) Judge McBryde also stated that, if the government had "used an ounce of logic," it would have known that the Texas recreational statute had "nothing to do with this lawsuit." (Id., at 126.) The government's motion for summary judgment based on this statute was "an affront to the Court." (Id. at 129.)

Finally, Judge McBryde issued a broad attack on the integrity of the entire Civil Division of the U.S. Attorney's Office in Fort Worth:

> "I have not enjoyed doing this, but, unfortunately, in the Civil Section of the U.S. Attorney's office here in Fort Worth there are more times than one where I had problems . . . . I just have the feeling that the Civil Section of the U.S. Attorney's office here in Fort Worth is not always candid with the Court and that the material I receive from that office has not been thought out and prepared. And it's very disappointing to me that I have to do the sort of things that I am doing today in this case.
>
> But I want it known to everyone that comes in my court that I take seriously the local rules of my court that includes Local Rule 9.1 and my orders that deal with settlement conferences, and I don't think the U.S. Attorney's office takes that seriously, and they certainly haven't taken it seriously in this case." (Exh. C-99, at 140-41.)

The preceding quotations are only a few excerpts from the dozens of pages of invective included in the March 11 transcript. Putting aside whether these allegations were correct (the

Fifth Circuit ultimately decided that they had no basis), the sarcastic and abusive language used by Judge McBryde is itself a cause for concern. There was simply no good reason to belittle and attack Brown and Hughes in such a repetitive and relentless manner.

Sixteen months after this hearing, Judge McBryde issued a thirty-three-page opinion castigating and imposing sanctions upon Hughes and Brown. The Judge noted that the sanctions were "of significantly less magnitude than would have been imposed" if the U.S. Attorney's Office had not shown improvement in its willingness to settle cases in the time since March 1993. (Exh. C-111, at 30.) Among other things, Judge McBryde suggested that Hughes and Brown had misled Dawson in an attempt to take advantage of his status as a pro se litigant.[15] The court ordered that Hughes and Brown be reprimanded and that Hughes attend fifteen hours of courses on the ethical responsibilities of attorneys. The court also ordered that copies of the opinion be delivered to the U.S. Attorney for the Northern District of Texas and to the staff of the Attorney General. The government moved to alter or amend the sanctions order. Judge McBryde denied this motion in a thirty-seven-page opinion which repeated, and embellished upon, many of the previous attacks on Hughes and Brown.

The government then appealed the finding of bad faith and the imposition of sanctions on Hughes and Brown. The Fifth Circuit reversed Judge McBryde's findings of bad faith and imposition of sanctions as "clearly erroneous" explaining, inter alia, that:

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[15] Judge McBryde's opinion hypothesized that:

> "Undoubtedly, counsel for defendant devoted significant time at both settlement conferences to falsely describing to Dawson the merit of his claim and the applicable law. They certainly have been less than candid in their presentations to the court on those subjects; and, there is no reason to think that they did not make statements to Dawson that were at least equally lacking in candor." (Id. at 27.)

- "We need not decide whether § 4042 or the Texas statute govern in this FTCA action; suffice it to say that this is a question of law on which reasonable minds could differ. And, needless to say, a district court's disagreement with the merits of a position asserted in good faith by counsel cannot serve as the basis for sanctions." 68 F.3d at 896.
- "It goes without saying, that, as noted, [Hughes and Brown] appear to have had numerous legitimate reasons for not offering the taxpayers' money to Dawson." Id. at 899.
- "In sum, Hughes and Brown should not have been sanctioned. Likewise, findings that they acted improperly, or unprofessionally, in the manner in which they handled this action are clearly erroneous. To that end, we find most inappropriate the district court's conclusion that they, in effect, tried to manipulate, or take advantage of, Dawson at the settlement conferences or in preparing the pretrial order. No more need be said; this most regrettable chapter is closed." Id.

Judge McBryde's comments and conduct during the Dawson matter had a devastating effect on the two U.S. Attorneys involved. Claude Brown retired early from the Office as a result, in part, of his experience in Dawson; Wayne Hughes has, in the view of his supervisor, become more reserved and indecisive, reducing his effectiveness as a litigator.[16] Both "worried about their careers, their abilities to remain as AUSAs." (Gartner, TR: 1335-36.) The case had serious consequences for the entire U.S. Attorney's Office as well. AUSA Marc Barta testified that Judge McBryde's broad attack on the Civil Division of the U.S. Attorney's Office "had a directly detrimental effect on their morale. They had their ability and/or integrity impugned by a federal judge in a public

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[16] Indeed, Brown has repeatedly noted his fear that, now that he had retired, Judge McBryde will appoint him in a criminal matter in order to sanction him again. AUSA Gartner acknowledged that this fear was "unfounded," but noted that "it shows the depths of how much Mr. Brown was affected by what happened to him." (Gartner, TR: 1337.)

record." (Id. at 1250.)[17] Fear that Judge McBryde might repeat his conduct during Dawson has also substantially complicated the settlement process for the Civil Division:

> "It is an absolutely continuing struggle in every case that we have to make sure the settlement offers we make or do not make are influenced only by our best litigation judgment and not by some fear of personal reprisal for what may or may not happen." (Id. at 1257-58.)

The Special Committee does not review here the legal or factual accuracy of Judge McBryde's determinations in Dawson. As noted, those determinations were reversed by the Fifth Circuit. Nevertheless, the Special Committee takes Judge McBryde's conduct in Dawson as described by the Fifth Circuit's opinion into account to the extent that this conduct relates to certain patterns of behavior on his part. As in the Anderson case, Judge McBryde showed a disturbing propensity to make allegations of "fabrication" and "bad faith" against government attorneys appearing before him based on what ultimately was a disagreement over legal principles. As in the Van Waeyenberghe case, Judge McBryde turned a principled decision not to settle a case into "bad faith" by public servants, accompanied by highly vitriolic and abusive attacks on the integrity of officers of the court. These patterns of conduct continue.

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[17] During cross-examination of AUSA Barta, counsel for Judge McBryde suggested that the real cause of any decline in morale at the U.S. Attorney's Office was Judge McBryde's sanctioning of AUSA Randy Means in the Chillcut case, which was affirmed by the Fifth Circuit. See Chillcut v. United States, 4 F.3d 1313 (5th Cir. 1993). AUSA Barta explained that Chillcut and Dawson were different in that the Office acknowledged fault in the Chillcut case, but vigorously denied any wrongdoing in Dawson. In its appeal to the Fifth Circuit in Chillcut, the Government did not challenge the imposition of sanctions, but only challenged that portion of Judge McBryde's order which prevented AUSA Means from seeking reimbursement from the Government for the sanctions imposed upon him. The Fifth Circuit's opinion in Chillcut addressed not only this issue, but also went on to criticize Means at length. Barta agreed that this opinion adversely affected the morale of the Office.

8. Charge of a Conspiracy to Subvert the Sentencing Guidelines (Spring 1993)

Mr. Ira Kirkendoll, the Federal Public Defender for the Northern District of Texas, testified about a meeting he had with Judge McBryde in the spring of 1993. Judge McBryde had summoned Mr. Kirkendoll to his chambers to discuss concerns he had with the Fort Worth branch of the Public Defender's Office. During the course of the meeting, Judge McBryde told Mr. Kirkendoll that he was concerned with the relationship between Mr. Kirkendoll's attorneys and the U.S. Attorney's Office. Judge McBryde indicated to Mr. Kirkendoll that he suspected that the Public Defenders and the U.S. Attorneys were engaged in a "collusive effort" to subvert the Sentencing Guidelines. (Kirkendoll, TR: 865-67.) Judge McBryde presented this as a "grievance[]" which did not invite a response. (Id. at 865.)

At the Special Committee's hearing, Mr. Kirkendoll vigorously denied any conspiracy to subvert the Sentencing Guidelines. He said that any such conspiracy would be "absurd" and that both the Public Defender's Office and the U.S. Attorney's Office were vigorous advocates who had an appropriate and professional relationship. (Id. at 865-66.)

At the hearing, Judge McBryde did not dispute Mr. Kirkendoll's testimony concerning the allegations he made against the Public Defender's Office and U.S. Attorney's Office. Judge McBryde also did not dispute Mr. Kirkendoll's testimony that there was no basis for these allegations.

The Special Committee concludes that there was no basis for Judge McBryde's highly inflammatory allegations of "collusion" between the two offices. These allegations must be viewed in the context of Judge McBryde's repeated attacks (in such matters as Turner, Anderson, and Dawson) on the U.S. Attorney's Office and the Public Defender's Office, both with respect to individual attorneys and with respect to these offices overall. As Messrs. Barta and Kirkendoll testified, these attacks seriously harmed morale and drove away competent attorneys from these two offices.

9. Barring of Matt Golla (July 1993)

The Special Committee heard testimony regarding Judge McBryde's decision to bar Assistant Federal Public Defender Matt Golla from his courtroom. These events were described by Mr. Golla, Mr. Paul Stickney and Judge McBryde.

Mr. Golla represented Michael Angelo Davis in a Hobbs Act robbery case before Judge McBryde. Mr. Davis admitted committing the robberies in question, but denied using a firearm during the robberies. As Mr. Golla described for the Special Committee, the key issue for the defense was discrediting those witnesses who testified that they thought Mr. Davis had brandished a gun.

During jury deliberations, the jury sent the court two notes — the first asking to hear the testimony of the first three witnesses and a second clarifying note asking to hear testimony relating to the description of the alleged gun or weapon and/or use of and any statement or threat about having a gun. Judge McBryde called Mr. Golla and Assistant United States Attorney Chris Stokes into chambers to discuss how to respond to the jury's second note. The jury had not identified the witnesses whose testimony with respect to the gun description it wanted to hear, but it did mention the first three witnesses. As the first three witnesses had not described a gun, however, it was not entirely clear to whom the jury was referring.

According to Mr. Golla, Judge McBryde explained to Mr. Golla and Mr. Stokes that he believed the jury was referring to witnesses Derden, Watson and Pace because, to his recollection, Mr. Derden had testified that he had seen the barrel of a gun, Ms. Watson had testified to the same effect and Ms. Pace had testified that she was threatened by an individual who said he had a gun. Mr. Golla agreed with Judge McBryde that Derden, Watson and Pace were the witnesses to whom the jury was referring, and he believed that Judge McBryde would simply identify those three witnesses for the jury but would not comment upon why he believed they were the three witnesses.

Following the conference in Judge McBryde's chambers, Judge McBryde returned to the courtroom and called in the jury. He proceeded to identify the three likely witnesses and then

went on to describe the witnesses' testimony relating to the gun — exactly what Mr. Golla believed the Judge would not do:

> "THE COURT: Okay. I have the second note that you have written, which says, "We would like to hear the testimony relating to the description of the alleged gun or weapon and/or use of and any statement or threat about having a gun."
>
> I'm reading this in context with the earlier note, and the earlier note made reference to the first three witnesses. So I assume you are talking about — and I have gone over this with the attorneys. We assume you are talking about the witnesses Derden, Watson and Pace. And I am not asking anybody to give me any answers now. I'm just going to give you some explanations and then suggest you go back and write me another note. But I assume you are talking about Derden, Watson and Pace, and the lawyers agree that I can tell you the reason we assume that is that Derden — I think he was the very first witness, and he mentioned seeing the end of the gun. Watson, I don't know that she was the second witness, but she was the second witness about a robbery. There may have been a witness in between who testified on the subject of where the merchandise was purchased. Watson was the second witness about a robbery, if our notes are correct, and she also said that she saw the end of a gun.
>
> And then Pace, she — quite frankly, I haven't tried to find out where in the sequence she testified, but she was one of the victims of a robbery. She was not the third or fourth witness. But, in any event, she was after Watson. She was the fourth witness after Watson. But she's the one who got the license number and who testified that she was threatened, whoever performed the robbery said something about having a gun. I am not trying to say exactly what she said.
>
> So that is how we conclude that those are the three that you are interested in." (Exh. C-8, at 110-111.)

When Judge McBryde responded to the jury's note as reflected above, Mr. Golla moved for a mistrial. Mr. Golla believed that the Judge's commentary on the evidence was

prejudicial to his client and that it was important for the jury to hear the full testimony of all three witnesses (both direct and cross-examination) on the key defense issue in the case, without commentary from the Court. Mr. Golla did not believe that he agreed to have Judge McBryde respond to the jury's note as he did. He believed that he agreed to have Judge McBryde identify Derden, Watson and Pace as the three witnesses in whose testimony the jury was interested. Mr. Golla testified that he did not want Judge McBryde to comment on the evidence because it did not allow the entire record on the key issue to be presented to the jury.

According to Judge McBryde, it was crystal clear at the end of the chambers conference that he intended to tell the jury exactly what he in fact told the jury as reflected in the transcript. Judge McBryde testified that he believed (and continues to believe) that Mr. Golla purposefully sandbagged him by agreeing to his proposal in chambers and then attacking it later in court.

Mr. Golla was upset by the incident and believed that Judge McBryde had treated him unfairly by implying in open court that he was a liar.[18] When he encountered Judge McBryde in the courthouse the next day, Mr. Golla did not acknowledge him. Upon returning to the office, he learned of a phone call Judge McBryde had placed to Paul Stickney, the First Assistant Public Defender. As Mr. Stickney testified, Judge McBryde called and told him that he had had an incident with Mr. Golla and he was ordering that Golla never appear in his courtroom again.

Judge McBryde placed a second call some time later that day to Stickney in which he indicated that he had rethought his earlier directive. Judge McBryde told Mr. Stickney that he would allow Mr. Golla to conclude his current cases, but that he would prefer that he did not appear before him again on any new matters. Judge McBryde also indicated that it would be

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[18] Judge McBryde stated on the record after Mr. Golla moved for a mistrial that: "I will learn from now on when I have any conversation with you concerning a case it will be in the presence of a court reporter..." (Exh. C-8, at 115.)

prudent for Mr. Golla to be transferred out of the Fort Worth office so that he would not be the attorney on cases that could be transferred to Judge McBryde. Mr. Stickney described this second phone call as being less than a direct order, but that Judge McBryde's tone had not moderated as compared with the first call in which he had ordered that Mr. Golla was never to appear in his courtroom again. Judge McBryde did not dispute Mr. Stickney's recounting of the two telephone conversations. A contemporaneously drafted e-mail memorandum from Mr. Stickney to Mr. Ira Kirkendoll, the Federal Public Defender for the Northern District of Texas, reflects the substance of the two conversations between Judge McBryde and Mr. Stickney and was introduced as a Committee Exhibit.

Although Mr. Golla's supervisors believed that Mr. Golla had done nothing to warrant being barred from Judge McBryde's court, they elected, after weighing the pros and cons, to submit to Judge McBryde's wishes based on their belief that failure to do so would result in retaliation by Judge McBryde on the office and would ultimately have a negative impact on their clients. Mr. Golla subsequently transferred to the Dallas office, and Mr. Stickney transferred from Dallas to Forth Worth.

While Judge McBryde clearly believed (and believes) that Mr. Golla intentionally misled him in the Davis case, the Special Committee does not doubt Mr. Golla's testimony that he did not understand that Judge McBryde would do more than identify the three witnesses. It is logical that Mr. Golla would not have wanted Judge McBryde to provide the jury with a partial summary of the testimony of the three key witnesses regarding the central (and only) defense issue in the case.[19] In addition to the logic of Mr. Golla's position, we find it highly unlikely that Mr. Golla, a young attorney who had committed himself to practice in Fort Worth where he would be required to

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[19] Judge McBryde conceded as much when he told the Committee that he would have had no problem with Mr. Golla's raising the objection per se, but that he objected to what he perceived as deception on Mr. Golla's part. Indeed, after Mr. Golla had raised the objection, Judge McBryde had the full testimony, including direct and cross, of each of the witnesses on the subject of the gun read verbatim to the jury.

appear before Judge McBryde repeatedly, would purposefully and so blatantly have "sandbagged" Judge McBryde.[20]

The circumstances surrounding this incident strongly suggest a misunderstanding. After an oral exchange, Mr. Golla believed Judge McBryde would do one thing, while Judge McBryde and AUSA Stokes believed he would do another. Just as in the matter involving Lonnie Woods which is discussed infra, Judge McBryde left no room for the possibility of a misunderstanding and concluded that an officer of the court intentionally lied to him. To make matters worse, Judge McBryde imposed on Mr. Golla what was, in effect, an extremely severe personal sanction, as well as a further edict (the Fourth Floor Order was already in effect at the time) to the Federal Public Defender about how to run that office.

10. Sanders Departure (October 1993)

The Special Committee heard testimony from former AUSA Michael Sanders concerning his experiences before Judge McBryde which led him to leave the U.S. Attorney's Office.

Sanders worked as an agent for the Internal Revenue Service from 1977 to 1986. At that time, he took a leave of absence to go to law school. In 1991, Sanders joined the U.S. Attorney's Office and was sworn in by Judge McBryde. He described his swearing in as follows:

> "I was extremely proud and my wife was there. It was a culmination of a lot of hard work, a lot of effort, some sacrifice that my family went through, some money spent to get my education. I had come from basically the bottom of the federal law enforcement scale up to what I considered the top." (M. Sanders, TR: 893.)

Mr. Sanders enjoyed working as an AUSA and believed that he did the job well. Nevertheless, in October 1993, Sanders left the U.S. Attorney's Office and returned to the IRS to

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[20] Judge McBryde also testified that he had had other "bad experiences" prior to the Davis case where he had questioned Mr. Golla's honesty. He was unable to identify any of these incidents, however. The Committee heard no evidence justifying Judge McBryde's treatment of Mr. Golla.

resume his work there as an agent. He explained that this decision was motivated by his experiences appearing before Judge McBryde.

Sanders initially described his experience in United States v. Crowell, 4:92-CR-139-A. In this case, the defendant was charged with participating in a fraudulent investment scheme. Sanders was the prosecutor. In the course of the litigation, Judge McBryde rejected two plea bargains, thereby forcing the matter to go to trial. The conviction was ultimately upheld, but the sentence reversed on the ground that Judge McBryde improperly participated in plea negotiations in violation of Federal Rule of Criminal Procedure 11(e)(1). See United States v. Crowell, 60 F.3d 199 (5th Cir. 1995).

In the course of the trial, Sanders planned to call an expert witness to testify on certain financial data. The defense attorneys objected that certain schedules of these data, upon which the expert was relying, had not been produced to them. Sanders responded that the defendant already had the underlying data that was presented in the schedules. Judge McBryde eventually permitted the expert witness to testify, but accused Mr. Sanders of adopting "a sort of cat-and-mouse approach to discovery." (Exh. C-86, at 76.) Sanders denied that he had intentionally withheld those materials from defense counsel.

Following this experience, Mr. Sanders began to reflect on his experiences before Judge McBryde, in particular the Anderson case (described above), in which he assisted AUSA Schattman. Based on his own experience in that matter, Sanders knew (as the Fifth Circuit held) that the alleged "special relationship" between AUSA Schattman and the defendant's uncle had no influence on the plea agreement between the government and the defendant. As noted above, Sanders also knew that the decision to dismiss the indictment of Anderson was appropriate in order to maintain the government's credibility with other future defendants who wished to cooperate with the government.

Based upon his experiences in Anderson and Crowell, as well as his knowledge of other incidents involving Judge McBryde, Sanders decided to leave the U.S. Attorney's Office and return to the IRS. He explained as follows:

> "I felt like there was an aura or kind of cloud hanging over us or me or anyone in the office, I guess, that you really didn't know if you made a technical error or minor error what was going to happen or how the court would react." (M. Sanders, TR: 902.)
>
> "[B]ased on the way the court handled the Anderson matter, other things that I have heard about and the fact that he jumps on me for what I considered was very minor, I just didn't want to take the chance that someday I might have my law license handed to me on a platter.
>
> I had worked hard to get it. I had approximately 15 years left before I could retire from government service. With Judge Mahon and Judge Belew in senior status, that meant probably half of my cases were going to be before Judge McBryde, so I had a choice to make. I had a place to go. Other people don't have places to go. So I went back to the Service after many, many hours of discussing this with my wife. It was certainly a decision that wasn't taken lightly." (Id. at 902-03.)

Sanders took a substantial pay cut in returning to the IRS. He considered transferring to the Dallas U.S. Attorney's Office, but this would have required him to move, as he and his family live approximately forty minutes northwest of Fort Worth.

11. Contempt for a Teleconference Failure (January 1994)

AUSA John Teakell was the prosecutor in the case United States v. Cushman, 4:93-CR-015-A. During the late afternoon on January 25, 1994 at approximately 4:00 PM, one of Judge McBryde's law clerks contacted Teakell and requested that he set up a conference call in which the court, AUSA Teakell, and the two defense attorneys (Messrs. Quentin McGown and Jack Beech) would discuss the jury charge in the case. The conference call was set for 4:30 PM.

Mr. Teakell's secretary had difficulty connecting all of the parties to the call. After additional efforts, she received a call from Judge McBryde's chambers on a different line indicating that the conference call was canceled and that Judge McBryde wanted the attorneys to come to his chambers for a hearing.

In the course of the ensuing hearing, Judge McBryde questioned and criticized Mr. Teakell at length about the

telephone system at the U.S. Attorney's Office. Judge McBryde then stated on the record that he considered Mr. Teakell to be in "contempt of court" because of his secretary's difficulties in setting up the call:

> "THE COURT: Mr. Teakell, why didn't we have a conference call set up at 4:30 on this?
>
> For the record, I have instructed Counsel to have a conference call set up at 4:30, and it's now 5:20. And it is my understanding Mr. Beech has just now arrived.
>
> MR. TEAKELL: Your Honor, we had attempted to have one set up by then. Our office is using the Sprint System, which the office on a whole has been dissatisfied with, because they are very slow. And when your law clerk called and asked him where the conference call was and what stage he was in, we were still waiting at that time.
>
> THE COURT: Okay. I think we asked over half an hour before 4:30 that there be a conference call at 4:30.
>
> MR. TEAKELL: Yes, sir.
>
> THE COURT: Or do you not have access to any other system to make a conference call through?
>
> MR. TEAKELL: We have —
>
> THE COURT: AT&T?
>
> MR. TEAKELL: We have to go outside, and we are supposed to use Sprint, and they tell us —
>
> THE COURT: Well, I have instructed your people, Mr. Teakell, I don't know how many times, that I am not going to put up with that nonsense. If there is another way to make a conference call, you make the conference call the other way. Now, is there another way to make one?
>
> MR. TEAKELL: I suppose we could use AT&T. I am not sure.
>
> THE COURT: Okay. Well I don't know how many times I have instructed your office to use AT&T, if that's what it takes to get a conference call set up.
>
> I consider that you are in contempt of court in not complying with my direction and setting up a conference call at 4:30. I am not going to take any further action on that at this time, Mr. Teakell. But when I instruct a lawyer to have a conference call set up, I expect that to be set up.

I have wasted almost an hour of my time because of you not doing what I told you to do.

MR. TEAKELL: Yes, sir. And I am going to recommend to our office that we — that some other system be implemented because this —-

THE COURT: Mr. Teakell, it's not a matter of implementing another system. It's a matter of when I say, 'set up a conference call,' you get on that phone to anybody you have to get on that phone to get it done.[21]

MR. TEAKELL: Yes, sir.

THE COURT: We are not talking about implementing. I am talking about getting a conference call set up.

MR. TEAKELL: Yes, sir.

THE COURT: And we have been down this road before with your office, Mr. Teakell. And I have told your people several times that I am not going to put up with this nonsense of trying to use some system that doesn't work. I want you to use a system that does work, and I want it used right then.

MR. TEAKELL: Yes, sir." (Exh. C-96, at 4-7 (emphasis added).)

In testimony before the Special Committee, AUSA Teakell described Judge McBryde's demeanor in the course of the preceding colloquy as follows:

"[H]e was extremely agitated, very belligerent toward me and he was obviously very upset. I took it as being very vicious." (Teakell, TR: 611.)

Mr. Gartner later testified that Teakell was "terrified" about testifying before the Special Committee about the teleconference incident. Following his appearance before the Committee, Teakell suggested that he be reassigned from the

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[21] Judge McBryde was shown a memorandum prepared by AUSA Teakell's assistant detailing her efforts to set up this call — which included twice reminding the Sprint operator that a federal judge was on the line. Judge McBryde testified that he probably learned of these efforts on the part of the U.S. Attorney's Office after the incident with AUSA Teakell. Despite learning of Mr. Teakell's efforts to get the call set up, Judge McBryde never apologized to Mr. Teakell for his conduct that day.

retrial of the Cushman case which was then pending before Judge McBryde.[22] He subsequently accepted a six-month temporary assignment in another district.

When questioned about this incident Judge McBryde confirmed that he knew, at that time, that Mr. Teakell was not personally responsible for choosing the telephone system used by the U.S. Attorney's Office and was not personally at fault for the difficulties experienced in setting up this conference call. When asked whether it was fair to hold Mr. Teakell in contempt for a failure of system set up by others affiliated with the United States Attorney's Office, Judge McBryde stated that "on the surface" holding AUSA Teakell in contempt did not appear to be fair. (McBryde, TR: 1055.) Nevertheless, Judge McBryde never apologized to AUSA Teakell.

When asked whether he showed empathy for Mr. Teakell in holding him in contempt of court, Judge McBryde responded that trial lawyers have to have "tough skin" and added:

> "Things like that have been said to me by judges over the years. It didn't hurt my feelings. That's part of our business." (McBryde, TR: 1205-06.)

12. Peter Fleury Arrest (September 1994)

The Special Committee heard testimony regarding Judge McBryde's ordering Assistant Public Defender Peter Fleury incarcerated because of his uncertainty over a question of attorney-client privilege and his effort to avoid waiving this privilege without some time to research the issue.

Mr. Fleury's client, Bradley Ray Sargent, filed a motion to substitute counsel alleging that he had lost confidence in Mr. Fleury. At the hearing on the motion, Judge McBryde inquired of Mr. Sargent why he wanted Mr. Fleury replaced. Among other things, Mr. Sargent alleged that Mr. Fleury had failed to show him certain police records.

Judge McBryde immediately asked Mr. Fleury whether he had in fact shown Mr. Sargent the police records. Understand-

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[22] One of the Cushman-related cases is now pending again before Judge McBryde after the Fifth Circuit vacated the convictions in this case based upon the Judge's limitation of cross-examination of a cooperating witness. See United States v. Landerman, 109 F.3d 1053 (5th Cir. 1997).

ably concerned when faced with this question, the answer to which would suggest that his client was lying to the Court, Mr. Fleury attempted to object to being required to answer the question on the ground of attorney-client privilege and on the general principle that he should not be forced to make a statement detrimental to his client's interests.[23] As the following excerpt from the transcript reflects, Judge McBryde did not allow Mr. Fleury to explain his dilemma or even voice the basis for his objection.

> "THE COURT: . . . . The third reason is that you wanted to see some records Mr. Fleury had in his file and he hasn't let you see them.
>
> Do you know what he's talking about, Mr. Fleury, on that?
>
> MR. FLEURY: Yes, Your Honor. I don't want to be in a position where I'm responding to —
>
> THE COURT: You're responding to my questions, Mr. Fleury. What records is he talking about?

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[23] As Mr. Fleury explained to the Committee:

> Well, as I've said, if the answer to the question — which it ultimately was that I did show my client the police reports and my client had just perjured himself — at least he had jeopardized any chance he had to get acceptance of responsibility in a case in which he ultimately pled guilty and which I anticipated there would be a plea of guilty to something in the case because they had overwhelming evidence against him on the majority of the counts.
>
> In addition to acceptance of responsibility, the other thing, other than a substantive criminal charge for a new offense involving a lie to the court, you can get two points under the guidelines for the obstruction of justice. It doesn't mean a criminal offense, but something that happens in this case that increases your — so it could be a five point swing for the man, which with his criminal history and the robbery offenses he had would have been a whole lot of time. The whole issue is he's saying he has lost confidence in me and I'm being asked to, in effect, give him more time by my answer. (Fleury, TR: 223-234.)

MR. FLEURY: Police reports.

THE COURT: And have you shown them to him?

MR. FLEURY: Again, Your Honor, it puts me —

THE COURT: I'm asking you to respond to my question, Mr. Fleury. Have you shown him the police report?

MR. FLEURY: I object to the question, because —

THE COURT: Do you want to answer my questions or not, Mr. Fleury? I'm ordering you to answer my question. Have you shown him the police report?

MR. FLEURY: May I make my objection first, Your Honor?

THE COURT: You have made your objection. Now have you shown him the police report?

MR. FLEURY: I don't think I can answer that, Your Honor.

THE COURT: Mr. Fleury, you will be taken into custody and taken downstairs until you're ready to answer my question unless you're now ready to answer my question.

MR. FLEURY: It's attorney/client privilege.

THE COURT: Okay. Mr. Fleury will be taken into custody and kept downstairs until he's ready to answer my question.

Mr. Fleury, if you wish to make known to the Marshal's Office when you're ready to answer my question, we'll hear you at that time." (Exh. C-15, at 7-8.)

As the excerpt above demonstrates, Judge McBryde did not give Mr. Fleury the opportunity even to state what his legal objection was, let alone to research the underlying legal question, nor did he give him time to consult with his client, prior to ordering him into custody.

Judge McBryde resumed the hearing later that day and demanded once again that Mr. Fleury answer his question. Still believing that he could not answer the question, but not having been afforded time to research the issue, Mr. Fleury was permitted to consult briefly with two of his colleagues who were then present in court. Although they told him that they had not had sufficient time to research the issue because they had been

focused on how to get him released from custody and not the privilege question, they concurred with Mr. Fleury's "gut" reaction that he should not answer the question. Judge McBryde then ordered Mr. Fleury incarcerated until he was ready to answer the question.[24]

Even after hearing Mr. Fleury describe his thought process in these proceedings and his hope that he would have been allowed to explain his position fully to Judge McBryde, to research the issue or, at a minimum, to consult with his client; even after hearing First Assistant Public Defender Paul Stickney describe that he and his colleagues were deeply concerned for Mr. Fleury's safety while he was in jail; and even after hearing Mr. Fleury himself describe the fear he had for his own safety in the face of being incarcerated with persons he had represented and who may have believed him responsible in some way for their incarceration, Judge McBryde maintained that his handling of the situation was appropriate under the circumstances.

Although the Special Committee has no quarrel with Judge McBryde's and the Fifth Circuit's legal determination that the attorney-client privilege was not a valid basis for Mr. Fleury's refusal to answer Judge McBryde's question, Judge McBryde's treatment of Mr. Fleury, an attorney who had at that time appeared before him numerous times, was appalling under the circumstances. There was no exigency warranting this treatment of Mr. Fleury, other than the self-defined exigency of Judge McBryde to complete the proceeding once it had begun.

13. Judge Thomas Lowe (March 1995)

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[24] On behalf of Mr. Fleury, the Public Defender's Office filed an emergency mandamus petition in which it sought a stay of Judge McBryde's incarceration order pending a determination of the underlying privilege question. The Fifth Circuit granted the stay, and Mr. Fleury was released from custody. The Fifth Circuit subsequently determined that: "The district court did not commit clear error in concluding that a response to the court's question would not violate the attorney-client privilege. This determination should allay counsel's concerns in this respect and permit counsel to respond to the court's question. The district court should not inquire further concerning Fleury's relationship with his client without first determining that an answer would not violate the attorney-client privilege." (Exhibit C-18.)

In March 1995, a conflict arose between a trial scheduled in Tarrant County State Court before the Hon. Thomas Lowe and a pretrial conference before Judge McBryde. Jay Gray was counsel for the plaintiff in Anderton v. Breceda (before Judge Lowe) which was set to go to trial on March 27, 1995; he was also counsel for the plaintiff in Brito v. Intex Aviation Services, Inc. (before Judge McBryde), which had a pretrial conference set for 9:30 AM on March 28.

On the morning of March 27, 1997, Mr. Gray filed a motion for a continuance with Judge McBryde asking that the pretrial conference be continued in light of the state court trial in the Anderton case. Jury selection commenced in Anderton that afternoon, with Judge Lowe presiding. At approximately 5:00 PM, one of Judge McBryde's law clerks notified Mr. Gray's office that the motion for a continuance was denied and that the pretrial conference in Brito would go forward as scheduled at 9:30 AM the next morning.

When Mr. Gray learned of this decision, he was surprised, as he understood that jury trials (whether in state or federal court) usually took precedence over pretrial and other procedural conferences involving only attorneys and a judge. Mr. Gray approached Judge Lowe and notified him of the apparent conflict between the trial and the conference. Judge Lowe suggested that Mr. Gray arrive early the next morning at 8:00 AM, so that they could call Judge McBryde together and explain the situation. Judge Lowe thought that perhaps Judge McBryde did not believe that Mr. Gray was actually in trial and he hoped to confirm this fact.

Accordingly, Mr. Gray arrived at Judge Lowe's chambers on the morning of March 28, 1997 at 8:00 AM. At that time, Judge Lowe placed a call to Judge McBryde's chambers. He was told by one of Judge McBryde's law clerks that the Judge was not in, but was expected shortly. Judge Lowe indicated that Mr. Gray was appearing in a trial before him and that this trial was set to resume at 8:30 AM. Judge Lowe asked the law clerk to inform Judge McBryde of this and asked that Judge McBryde call as soon as possible. Judge Lowe indicated that he would leave the bench to receive Judge McBryde's call.

The trial resumed and both Mr. Gray and defense counsel gave opening statements. Mr. Gray recalls being nervous during his opening statement because he was concerned about the pending conference before Judge McBryde. No call had been received from Judge McBryde by 9:10 AM. Accordingly, at that point, Judge Lowe recessed trial so that Mr. Gray could attend the pretrial conference before Judge McBryde.

Judge Lowe also decided to visit Judge McBryde's chambers in order to inform him personally that Mr. Gray was in fact in trial and that a jury was in recess awaiting his return.

Judge Lowe arrived at Judge McBryde's chambers before Mr. Gray. He was directed into a conference room where two defense counsel in the Brito case were awaiting the start of the pretrial conference. Judge Lowe signed in along with his court reporter, who had driven him to the federal court. (The court reporter did not have any stenographic equipment with her.) At approximately 9:30 AM, one of Judge McBryde's law clerks approached Judge Lowe. The clerk was "stammering and red-faced" and said to Lowe: "Judge, I just feel terrible about this, but I have been given a message to give to you." The clerk then informed Lowe that "Judge McBryde told me to tell you that you are not welcome here and you are to leave." (Lowe, TR: 64.) Judge Lowe was "stunned" by this statement. After a few moments, Judge Lowe and his assistant left Judge McBryde's chambers.

Outside the chambers, they met the law clerk who had delivered Judge McBryde's message. The law clerk was apologetic to Judge Lowe for what had happened. Judge Lowe told the clerk that he did not hold this incident against him since he was only doing his job. He asked the clerk to convey to Judge McBryde that he would appreciate it if he would release Mr. Gray as soon as possible.

When Judge Lowe returned to his chambers, he immediately wrote Judge McBryde a detailed letter recounting the preceding incidents, explaining that:

"Since I had not heard from you, I came to your Court hoping to speak with you privately. My purpose was simply to inform you personally that Mr. Gray was, indeed, in trial before this Court, and that a jury was in recess awaiting his return, and

that your releasing him to return to this Court as soon as possible would be appreciated." (Exh. C-7)

At the end of this letter, he stated:

> "I simply wish to avoid further waste of taxpayers' expense now and in the future. I would welcome any suggestions or guidance which you might wish to give me in that regard.
>
> My private line is [phone number listed]. I would appreciate your call at your convenience." (Exh. C-7)

Judge Lowe never received any response from Judge McBryde to this letter, either in writing or by telephone.[25]

When asked why he refused to see Judge Lowe or to have one of his staff inquire of Judge Lowe as to why he had come to Judge McBryde's chambers, Judge McBryde responded simply that it was "inappropriate" for Judge Lowe to "intrud[e]" into his conference room and that he (Judge McBryde) "assumed" that Judge Lowe was there "to engage in some kind of inappropriate activity." (McBryde, TR: 1031-32.) This assumption was made without any attempt by Judge McBryde actually to ask Judge Lowe what his purpose was:

> "Q. Did you ask anybody on your staff to go out and ask Judge Lowe why he was there?"
>
> A. No, I didn't.
>
> Q. Do you think that would have been a courteous thing to do?
>
> A. I didn't think at this time it was an appropriate thing to do, under the circumstances, for them to be intruding in my courtroom. I didn't think anything was necessary for me to do other than to invite him to leave my conference room.
>
> Q. You have a fellow judge who has come over trying to see you and he is waiting outside and my question is, simply, don't you think it would have been a courteous,

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[25] Judge McBryde later added that he saw Judge Lowe a few days later in an elevator and "it was clear from our visit that I had no ill will toward him." (McBryde, TR: 1035.) Judge McBryde mentioned that he had received the letter but did not discuss the contents of the letter.

appropriate thing to do to send somebody out to ask the state judge what he wants?"

A. Well, I have already answered that. No, I did not think that was an appropriate thing to do under the circumstances. Bear in mind that's a private conference room that I have a conference scheduled in at 9:30, and apparently the attorneys for the defense were already in that conference room. I didn't know whether he was there for the purpose of creating a confrontation of some kind. I simply did not know what he was there for. I was told he was there with a court reporter. I assumed that it was to engage in some kind of inappropriate activity on his part and — go ahead.

Q. Did you ask anybody to find out whether the court reporter had a Stenograph machine?

A. Mr. Fiske, I don't know how many times I can tell you. I did not ask somebody to go up and find out why he was there. It was simply inappropriate, whatever the reason was, for him to be in my private conference room with a court reporter, when I was beginning to engage in a pretrial conference with one of my cases." (McBryde, TR: 1031-32 (emphasis added).)

Thus, as in a number of matters reviewed by the Committee, Judge McBryde here showed a disturbing inclination to conclude that an individual (here a state court judge) was motivated by a nefarious purpose without engaging in even the most basic inquiry to determine whether this suspicion was justified.[26]

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[26] During the hearing before the Special Committee, counsel for Judge McBryde suggested Mr. Gray was aware of the conflict between the Anderton and Brito cases a month in advance and failed to notify Judges Lowe and McBryde in a timely manner of this conflict. Mr. Gray testified that he had expected the Anderton case to settle prior to trial as most of his cases do, and only became sure that the case would go to trial on the evening of Sunday, March 26, 1995. It did not make sense to seek a continuance from Judge McBryde earlier because there was a good chance that the conflict would have disappeared by the time of the pretrial conference. The Special Committee finds this explanation not unreasonable. Of more importance, however, the Special Committee concludes that the timeliness

Our federal system of justice, whether viewed from the grand perspective of the Framers or the mundane perspective of daily operation, requires many things, including coordination and respect between the federal and state judicial systems. Judge McBryde's treatment of Judge Lowe constituted a conscious, deliberate decision to show disrespect to a state court judge. His conduct is an embarrassment to the entire federal judiciary. We would be deeply concerned if this were the only incident of Judge McBryde's disrespect for, and unwillingness to coordinate with, other judges. The Special Committee is sad to say that it is not.

14. Satz (April 1995)

The facts of the criminal trial in United States v. Eric Michael Satz, No. 4:94-CR-094-R (N.D. Tex.), as well as the conflict over the reassignment of this case from Judge McBryde to Judge Buchmeyer are summarized in opinions of the Fifth Circuit and will not be reviewed at length here. See generally United States v. Gray, 105 F.3d 956, 961-62 (5th Cir. 1997); In re McBryde, 117 F.3d 208 (5th Cir. 1997).

Michael Satz was indicted and later convicted in separate proceedings first in Phoenix, Arizona, and then in Fort Worth, Texas. AUSA Darcy Cerow was the prosecutor in Phoenix. The Phoenix case was assigned to Judge Paul G. Rosenblatt, and the Fort Worth case to Judge McBryde. Judge Rosenblatt eventually scheduled Satz's sentencing in Phoenix for May 15, 1995 and, shortly thereafter, Judge McBryde scheduled the sentencing in Fort Worth for April 28, 1995.

Investigation into related criminal activity by Satz's co-conspirators continued in Phoenix. After extended negotiations, on March 27, 1995, certain co-conspirators (the Schwartzes) pled guilty before Judge Rosenblatt to certain criminal activity. In their plea bargains, the Schwartzes agreed to cooperate with law enforcement authorities in their continuing investigation.

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of Mr. Gray's motion is irrelevant to evaluating Judge McBryde's conduct toward Judge Lowe, since Judge McBryde was unaware of this issue at the time. Furthermore, even if Mr. Gray had not acted in a timely manner, this would not excuse Judge McBryde's conduct towards Judge Lowe.

Sealing orders were entered by Judge Rosenblatt in connection with these plea agreements.

On April 4, 1995, AUSA Umphres moved to continue Satz's Texas sentencing until June 23 for several reasons, including the difficulty of bringing Satz to Texas, the ongoing investigation into the activities of Satz and his co-conspirators in Arizona, and a split between the Fifth and Ninth Circuits concerning a Double Jeopardy issue raised by Satz's sentencing.

Satz filed a motion to be transferred to Fort Worth for sentencing with the Arizona District Court, which Judge Paul G. Rosenblatt denied on April 17. When he learned of this order, Judge McBryde called Judge Rosenblatt and persuaded him to agree to transfer Satz to Fort Worth. Judge Rosenblatt said nothing to Judge McBryde to suggest that they arrange the order of sentencing to the detriment of Satz. On April 18, Judge McBryde denied AUSA Umphres' motion to continue Satz's Texas sentencing.

On April 21, AUSA Umphres filed under seal a renewed motion to continue sentencing. The motion made specific reference to the sensitivity of the information relating to the ongoing investigation, and explained that disclosure could jeopardize the investigation. It also attached a copy of a supplemental sentencing memorandum, which referred to the fact that information was under seal in the Arizona proceeding and to AUSA Cerow's reasons for seeking to seal that proceeding in the first place.[27]

Later in the day on April 21, Judge McBryde issued an order denying this motion and further stating that

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[27] The memorandum stated:

> "[AUSA Cerow] also told me that the plea agreements and factual resumes relating to the defendants had been filed under seal, as she wanted to keep the fact of their cooperation secret for the moment in order to avoid alerting other targets of her investigation, who she did not identify." In re McBryde, 117 F.3d at 211.

> "[t]he material provided in the [government's] report and its attachments strongly indicates that one or more representatives of the United States of America has engaged in conduct calculated to frustrate the objectives of sentencing in this action and to cause noncompliance with the order signed by the court in this action on April 18, 1995." In re McBryde, 117 F.3d at 211.

Judge McBryde instructed AUSA Cerow and Postal Inspector Whiteaker to appear at an April 24 hearing and to bring with them all information potentially relevant to Satz's sentencing.

Arrangements were made by the government for AUSA Cerow to be represented at the hearing by R. Joseph Sher, a trial lawyer with the Department of Justice. Prior to the hearing on April 24, Cerow and Sher faxed a copy of Judge McBryde's April 21 order to Judge Rosenblatt and spoke with Judge Rosenblatt about the proper response. Judge Rosenblatt told Cerow and Sher that the sealing orders he entered on March 27 "protect[ed] both the sources of the information and the information itself" and that no disclosure should be made to Judge McBryde, even ex parte, in camera, without prior consultation between Judges Rosenblatt and McBryde. (Rosenblatt, TR: 636-37; Exh. C-65.) Judge Rosenblatt told Cerow that he would be willing to discuss the sealing order with Judge McBryde by telephone.

The April 24 hearing then ensued. At this hearing, in response to Mr. Umphres' attempts to explain why a continuance was called for, Judge McBryde stated that "you want me to manipulate the proceedings so that you can get a better deal by me manipulating the proceedings." (Exh. C-66, at 8) Cerow and Sher then attempted to explain that the government was prohibited from turning over all of the information sought in Judge McBryde's April 21 order because some of this information was covered by a sealing order entered by Judge Rosenblatt. (Id. at 13-15.) When Judge McBryde pressed to know the contents of the sealing order itself, Sher responded that he had asked Judge Rosenblatt earlier that day to make available a redacted copy of the order, but that Judge Rosenblatt had refused to do so. AUSA Umphres suggested that Judge McBryde call Judge Rosenblatt directly. Judge McBryde

declined, stating "it's to the point where I should not be in the position [of] trying to persuade Judge Rosenblatt to do things." (Exh. C-66, at 28.) Judge McBryde concluded the April 24 hearing by suggesting his inclination to issue a show-cause criminal contempt order against AUSA Cerow or to dismiss the charges against Satz, or both.

The next day, April 25, Judge McBryde resumed hearings and proceeded to question Cerow and Whiteaker at length about the content and scope of Judge Rosenblatt's sealing order. Rather than calling Judge Rosenblatt as he had been invited to do, Judge McBryde expressed skepticism that AUSA Cerow and Whiteaker were prevented from disclosing information to him because of a sealing order in Arizona: "Well, I think there's been some game playing, some bad game playing, if not dishonesty." (Exh. C-67. at 42.)

During a recess in the proceeding, AUSA Cerow and Sher contacted Judge Rosenblatt again and described the proceedings before Judge McBryde. (Rosenblatt, TR: 638.) In response, Judge Rosenblatt faxed to Fort Worth an order which read as follows:

> "On March 27, 1995, a criminal proceeding relating to a Northern District of Texas, Ft. Worth Division, 4:94-CR-094-A, was filed in this Court. All matters pertaining to that proceeding were placed under seal by this Court and will so remain." (Exh. C-68.)

Judge Rosenblatt sent out this order "so [Judge McBryde] would have some reason to believe that what [Cerow] was telling him was true." (Rosenblatt, TR: 640.)

When presented with this order, Judge McBryde commented that: "It's so vague and general it doesn't tell me any more than I've already learned from the people here." (Exh. C-67, at 45.) He went on to indicate that he did not believe AUSA Cerow's description of the order was truthful:

> "My inclination so far, based on the information I have, is not to believe that there is an order of the kind that has been described by Ms. Cerow. I recognize that I have something from Judge Rosenblatt saying some kind of order has been entered in some case, but that doesn't tell me enough information to reach a conclusion that an order

of the kind Ms. Cerow has described has been entered." (Id. at 46.)

At the end of the hearing, Judge McBryde signed an order to show cause why "coercive measures" should not be taken to compel AUSA Cerow to disclose the information in question.

Later in the day on April 25, Judge Rosenblatt faxed a letter directly to Judge McBryde which read as follows:

> "If you decide to go forward with the sentencing, under the circumstances, please keep in mind that eventually [Satz] will be returned to [Phoenix] for sentencing and whatever you do might have ramifications on my sentence. I ask you to please consider this and not jeopardize my case or any other proceedings pending in my court." (Exh. C-69.)

Judge Rosenblatt sent this letter out of "frustration" at the treatment of AUSA Cerow and in an effort to convince Judge McBryde to call him to discuss the scope of the sealing order in Arizona. (Rosenblatt, TR: 640-41.)

Hearings resumed on April 26. In response to Judge Rosenblatt's letter of the April 25, Judge McBryde stated: "[A]pparently I have a different philosophy from Judge Rosenblatt on handling matters. I don't have the philosophy that you manipulate proceedings for the benefit of the government or the defendant." (Exh. C-70, at 5.) After further discussion, Judge McBryde ordered the text of Umphres' second motion to continue sentencing unsealed and revealed to Satz and his counsel. The unsealing order reached the information filed under seal on April 21, including the attached exhibit disclosing the Schwartzes' guilty pleas and agreements to cooperate with the government to further the Arizona criminal investigation. McBryde concluded the hearings with the following statements:

> "I find . . . that the contention by Ms. Cerow that she was prohibited by a secrecy order or some kind of order of the court in Arizona from making disclosures and delivering the information she was ordered to make . . . is a fabrication and it's not true. . . .
>
> I don't believe Ms. Cerow believes that any order that has been entered prohibits her from delivering that informa-

tion. I find that she does not believe that any order prohibited her from complying with my orders." (Id. at 50-51.)

The Special Committee will not address whether the evidence relied upon by Judge McBryde was sufficient at the time to justify his conclusions concerning the credibility of AUSA Cerow's and Postal Inspector Whiteaker's statements as to the scope of the sealing order. In the context of the present investigation, the Special Committee is concerned that Judge McBryde would have made such serious allegations against two public servants without contacting Judge Rosenblatt directly. When asked why he did not attempt to contact Judge Rosenblatt prior to making these serious finding, Judge McBryde simply stated:

> "I had a great deal of information that enabled me to reach a conclusion that what [AUSA Cerow] said was not true, and I didn't think it was necessary or appropriate for me to call Judge Rosenblatt to discuss the matter with him." (McBryde, TR: 1210.)

The Special Committee finds this explanation inadequate and inexplicable given the gravity of the allegations at issue, the collateral consequences to these public servants of the finding, and the fact that if he had called Judge Rosenblatt he would have learned that Judge Rosenblatt supported the statements AUSA Cerow had made about the existence and scope of the sealing order.

The Special Committee is also disturbed that Judge McBryde would suggest in open court that Judge Rosenblatt, a colleague on the federal bench, was attempting to "manipulate" proceedings to the detriment of the defendant in Satz. (Exh C-70, at 5.) Judge Rosenblatt vigorously denied this allegation and the Special Committee fully credits Judge Rosenblatt's testimony. The manner in which Judge McBryde attacked the integrity of Judge Rosenblatt is another example not only of Judge McBryde's questionable temperament but also of his unwillingness and inability to work effectively with other participants in the judicial system.

15. Torres (April 1995)

The facts of the Torres case are summarized at length in opinions of the Fifth Circuit in In re McBryde, 117 F.3d 208

(5th Cir. 1997), and will not be reviewed here except as necessary.

Torres was a wrongful death action commenced in 1990. It was settled in December 1991, for $200,000. The settlement was reflected in a final judgment dated December 20, 1991 which was prepared by counsel for the parties. Of this sum, $40,000 was earmarked for a minor plaintiff, Grecia Torres, a citizen of Mexico who had no intention of ever residing in the United States. The judgment directed that the $40,000 was to be deposited by the Clerk of the District Court "in an interest bearing account at the highest available rate of interest."

As a consequence of an inadvertent error in the Clerk's office, the money was never invested. The error went unnoticed for approximately three years. On March 16, 1995, during a routine review, Ms. Mary Ramos, the financial deputy for the Fort Worth Division, discovered that the $40,000 earmarked for Grecia Torres had never been deposited in an interest-bearing account. Ms. Ramos immediately took steps to place the money in a certificate of deposit. The next day, Ms. Pam Murphy, Deputy-in-charge of the Fort Worth office, contacted Ms. Nancy Doherty, the Clerk of the Northern District of Texas, and informed her of the error.

Nancy Doherty has been the Clerk of the Northern District of Texas for approximately fourteen years, serving under four different chief judges. When Ms. Murphy informed Ms. Doherty of the problem, Ms. Doherty instructed her to contact the Administrative Office of the United States Courts to find out what needed to be done to correct the problem. On March 23, the Administrative Office informed the Clerk's office that the only way to redress the problem would be for plaintiff's counsel to file a claim under the Federal Tort Claims Act (the "FTCA"). On March 24, Ms. Murphy met with Judge McBryde to inform him of the problems and the Administrative Office's advice.

On March 30, 1995, almost one week after his meeting with Ms. Murphy, Judge McBryde entered an order in the Torres case. Although he had received a letter from the Administrative Office which explained that the Federal Tort Claims Act provided the exclusive remedy in this situation, Judge McBryde stated that he was "not inclined to think" that

this was correct. After conducting what he called a "preliminary inquiry" (which did not establish that the Administrative Office's position was wrong) concerning whether the Administrative Office's conclusion was correct (McBryde, TR: 1186), Judge McBryde took the opportunity to express his "disappointment" that there would "even be a suggestion" that a FTCA claim was the proper remedy. (Exh. C-77.)

The order described the error in harsh terms, stating that the Clerk had "failed to comply" with the final judgment, and then, notwithstanding the obvious inadvertence of the error, proceeded to make several references to a "violation" of the order. (Id. at 1-4.) The March 30 order also expressed irritation that Judge McBryde had not been informed of the error for a "significant period of time" (in reality, only eight days had elapsed after the failure was discovered, during which the Clerk was searching for a solution to the problem that she could present to Judge McBryde). (Id. at 2 n.2.) The order directed the Clerk to file, within ten days, a "document" providing: (a) information concerning the amount of interest that had been lost because of the failure to invest the $40,000; and (b) an explanation of why the money was not invested and how and when the failure to invest the money was discovered. (Id. at 4-5.)

Ms. Doherty was "stunned and bewildered" by what she perceived as the "hostile" tone of this order. (Doherty, TR: 794-96.) She consulted Chief Judge Buchmeyer, seeking his advice on how to respond to Judge McBryde's order and asking whether she should retain a lawyer. At Chief Judge Buchmeyer's suggestion, she prepared a letter, as to which he suggested changes, with exhibits providing the information requested by the March 30, 1995 order. The information provided in the letter was extremely detailed and included charts showing the possible amounts of interest based on length of deposit; the range of per-day interest based on different assumptions; and how the interest amounts were calculated. It also contained a statement explaining the procedures followed by the deputy clerk when the $40,000 was received and the reasons for the failure to place the money in an interest-bearing account, as well as a description of what occurred after the discovery of the error. Ms. Doherty testified that compiling this information was

a high priority and that, at her direction, her budget and financial officer did nothing other than work on compiling this information for several days.

The letter expressed surprise and "disappointment" that Judge McBryde had chosen to proceed in a formal manner, since the Clerk's office had acknowledged that a mistake had been made and was taking steps to rectify the problems. Nonetheless, the letter recognized the "obligation to respond to [Judge McBryde's] order" and proceeded to do so. (Id. at 1.) It explained that an investigation had determined that Ms. Miller had not been guilty of intentional or careless disregard of the Final Judgment. Ms. Doherty concluded by stating that she "would really like the opportunity to resolve this matter without further action on your part," noting that counsel for plaintiff preferred to proceed through the FTCA, and that she had been assured by the Administrative Office that every effort was being made to expedite the processing and payment of the claim. (Id.)

Judge McBryde's response to Ms. Doherty's April 7 letter was contained in his April 25, 1995 order, which criticized Ms. Doherty in extraordinarily harsh terms. The order stated that Ms. Doherty's letter "is so unprofessional and so disrespectful of the undersigned judge and the court, and manifests such a high level of insolence, that it borders on, if it does not constitute, contempt of court by one of its statutory officers." (Exh. 79, at 2) Judge McBryde proceeded to accuse Ms. Doherty, inter alia, of "a total disregard of the professionalism she should have in the conduct of her official duties," and of "lack of respect and understanding of the needs, powers and responsibilities of the court." (Id. at n.2) Most egregiously, he accused Ms. Doherty of "collaborating" with counsel for Grecia Torres in an effort to prejudice the minor's rights (id. at 3), stating that Ms. Doherty "had set upon a course of circumventing the investment requirements" of his order by "attempting to 'put in place' an administrative procedure for the minor plaintiff to pursue." (Id. at 2 n.2.)

This allegation was made three weeks after Judge McBryde had been told by the Administrative Office of the United States Courts that a tort claim was the only course allowed by law. Despite his reputation for thoroughness, Judge McBryde had

done no further research on the FTCA beyond his initial "preliminary inquiry" before issuing this order. In fact, had Judge McBryde researched this issue, he would have discovered that the Administrative Office was correct and that the FTCA was the only available remedy. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jacks, 960 F.2d 911 (10th Cir. 1992).

Judge McBryde concluded that he would — for the time being — refrain from imposing sanctions upon Ms. Doherty because "hopefully the clerk only had a lapse in her understanding of her role in the scheme of things; and this court would prefer to think that the order will be a sufficient reminder to her of what a clerk's role is, or, if not, should be." (Id.) He proceeded to order Ms. Doherty's April 7 letter stricken from the record and to direct that further responses to the questions posed in the March 30 order be provided. (Id. at 3-6)

Ms. Doherty received a copy of the April 25, 1995 order on April 26, 1995, while attending a meeting in Chief Judge Buchmeyer's conference room about implementing new security measures in the wake of the Oklahoma City bombing. Ms. Doherty was "devastated" by what she perceived as "a vicious attack on me personally and professionally." (Doherty, TR: 803-04.) Ms. Doherty became visibly upset and, after the meeting, showed the order to Chief Judge Buchmeyer in the presence of three other District Judges, whom Chief Judge Buchmeyer had asked to remain in the conference room when he noticed Ms. Doherty's appearance of extreme distress. Shortly thereafter, Judge Buchmeyer reassigned the Torres case from Judge McBryde to himself (id. at 807-08), a decision ultimately reversed in In re McBryde, 117 F.3d 208 (5th Cir. 1997).[28]

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[28] Since the decision in In re McBryde, 117 F.3d at 208, reassigning the Torres case to him, Judge McBryde has withdrawn the April 25 order, ostensibly on the ground that the Ms. Doherty's letter was written by Judge Buchmeyer. See Torres v. Trinity Industries, Inc., No. CA4-90-812-A, Order, at 3 (N.D. Tex. July 21, 1997). Judge McBryde's current beliefs as to the authorship of this letter are irrelevant to evaluating his conduct in April 1995, which must be based on his knowledge and beliefs at the time.

The extraordinarily harsh language used by the Judge toward Ms. Doherty in this matter makes it clear that Judge McBryde lacks a proper appreciation for the use and effect of the vast and extensive powers given to a federal judge. Ms. Doherty was then, and, as dramatically evidenced by her testimony before the Special Committee, remains today shaken by her treatment. She is a dedicated, efficient public servant who takes pride in her work and upon whom, along with others, the federal courts rely. Just as Judge McBryde's abusive conduct has had a negative effect on the morale of the U.S. Attorney's Office and the Public Defender's Office, we find that it has had a similar effect on the Clerk's Office.

16. Turner II (November 1996)

On July 17, 1992, Judge McBryde sentenced Patrick Leon Turner to fifty-seven months imprisonment for tax fraud.[29] In October 1992, Turner escaped from a federal prison in the Eastern District of Texas. He was subsequently apprehended and, on July 23, 1993, received a sentence of thirty months in connection with this escape to be served concurrently with the fifty-seven months sentence imposed by Judge McBryde.

Following his apprehension, Turner began cooperating with the government on several federal narcotics investigations in Oxford, Mississippi. As a result of this cooperation, William Martin, an AUSA in Oxford, contacted Tonda Curry and Richard Roper, AUSAs in Tyler and Fort Worth, respectively, to ask them to file motions to reduce Mr. Turner's sentence.[30] Martin noted, inter alia, that Turner had "risked his life" to provide useful information on a possible "murder-for-hire" and on several major drug traffickers and had provided critical testimony before a grand jury in Oxford. (Exh. C-52(H).)

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[29] In this proceeding, Turner was represented by Federal Public Defender Tim Henry, who, as noted in Part III.A.2, was accused by Judge McBryde of lying on behalf of Mr. Turner in connection with Turner's sentencing.

[30] Since the sentences in Fort Worth and Tyler were served concurrently, the actual time served by Mr. Turner would only be impacted if both sentences were reduced.

On July 22, 1994, AUSA Curry filed in the Eastern District of Texas a motion to reduce Mr. Turner's sentence pursuant to Fed. R. Crim. P. 35(b). Judge Justice held a hearing on August 30, 1994 and granted the motion, reducing the Eastern District sentence from thirty months to twelve months and noting his hope that the court in the Northern District of Texas would do likewise.[31]

In November 1994, AUSA Martin contacted AUSA Roper again to request that Roper file a motion for a sentence reduction on behalf of Turner. Martin noted that Turner had continued to supply "valuable and substantial assistance" concerning the whereabouts of a fugitive narcotics dealer. (Exh. C-45 (attachment).) Accordingly, in December 1994, AUSA Roper filed a Rule 35 motion with Judge McBryde which stated that Turner had provided information not known to him until more than one year after the imposition of his sentence (as required by Rule 35(b) under the circumstances). The correspondence from AUSA Martin was attached as an exhibit.

Shortly thereafter, Judge McBryde issued an order requesting additional affidavits establishing that the court was authorized to reduce Turner's sentence under Rule 35(b). AUSA Roper filed a response which attached an affidavit from Lynn Mead, a Special Agent of the Drug Enforcement Administration. This affidavit detailed Mr. Turner's cooperation and identified certain information provided by Mr. Turner which he acquired at least one year after his sentencing.[32] After receiving this response, Judge McBryde denied the motion to reduce Turner's sentence.

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[31] In the course of this hearing, Mr. Curry incorrectly indicated that the information provided by Mr. Turner had been acquired by him subsequent to his sentencing in July 1993.
This error was legally irrelevant, however, because AUSA Curry's motion had been filed within one year of sentencing, making it unnecessary under Rule 35(b) for the information to have been acquired subsequent to sentencing.

[32] In particular, in November 1994 (more than a year after sentencing), Turner was given a phone number by another inmate as a contact number for a fugitive. He passed this number along to authorities.

In April 1996, AUSA Martin wrote to AUSA Roper again and asked Roper to file a second Rule 35 motion on behalf of Turner. This letter explained that, in November 1995, a criminal defendant, Robert Armstrong (a/k/a Robert Collins) charged with various narcotics and firearms violations described his criminal activities to Mr. Turner, who then informed the government and became an important witness against Armstrong at a trial set for April 1996. Federal agents had Mr. Turner transported to Oxford, Mississippi in order to testify at Armstrong's trial. Armstrong had vigorously maintained his innocence up to this point. When Armstrong learned that Mr. Turner was cooperating with the government and was present in Oxford, he began inquiring about and eventually entered into a plea bargain. Armstrong received a sentence of 157 months and became an important cooperating witness himself. (Exh. C-56, Tab B.)

Accordingly, AUSA Roper filed a second Rule 35 motion for Mr. Turner and attached AUSA Martin's letter as an exhibit. Following the filing of this motion, Judge McBryde requested additional information from AUSA Roper, which was provided in several supplemental filings. Included among these filings were, inter alia, a handwritten letter (erroneously termed a "deposition" by Mr. Turner) from Mr. Turner to AUSA Martin describing his conversation with defendant Armstrong and the plea agreement executed by Armstrong.

On November 5, 1996, Judge McBryde issued a memorandum and order denying the second motion for a reduction of Mr. Turner's sentence. In reaching this conclusion, Judge McBryde noted that the government had not produced to him any "memo, report, notes, [or] other writings prepared by agents of the government" detailing Mr. Turner's cooperation in the Armstrong prosecution. The court went on to conclude that this absence of such written documentation suggested that AUSA Martin had "fabricated" his report of cooperation on the part of Turner:

> "If any such memo, report, etc., existed, the government was obligated to disclose it to the court in response to the directives of the September 11, 1996, order. Therefore, the court assumes that there is no such item and that the

> representations made to the court concerning 'new assistance' are less than candid, if not fabrications in whole or in part. The court is not inclined to give weight to the self-serving 'deposition' Turner scripted on January 26, 1996, for the benefit of AUSA Martin." (Exh. C-57, at 12-13.)

Judge McBryde made this damaging statement (which ultimately resulted in an investigation of Martin by the Office of Professional Responsibility ("OPR") of the Department of Justice[33]) without giving Martin any notice or opportunity to explain why he had no notes. Indeed, AUSA Martin had never appeared as counsel in any of the Turner proceedings before Judge McBryde. Judge McBryde also criticized the other two AUSAs involved in the Turner matter (AUSAs Roper and Curry) in terms that called into question their integrity.[34]

While the memorandum and order were placed under seal, Judge McBryde specifically stated that the sealing would not prevent the use of the document in connection with a governmental disciplinary proceeding, making it clear that Judge McBryde anticipated that the allegations contained in his memorandum and order would result in an OPR investigation of all three AUSAs. Indeed, AUSA Roper felt that he was obligated to report this incident to the OPR. OPR conducted an

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[33] As a general matter, AUSAs are obligated to report to the OPR when a federal judge accuses them of being untruthful or dishonest.

[34] He criticized AUSA Roper for "withholding information from the court" in his initial Rule 35 motion concerning the fact that Judge Justice had granted a sentence reduction in Tyler. (Exh. C-57, at 14.) He also wrote that AUSA Curry's statement to Judge Justice that Mr. Turner had acquired the information prior to sentencing "appears to have been blatantly false." (Id. at 15.)

At the hearing before the Special Committee, AUSA Roper explained that he had not provided additional details in his motion papers because, based on prior experience, he expected that Judge McBryde would hold a hearing on the motion during which these details would be disclosed. With respect to AUSA Curry's statement to Judge Justice, AUSA Roper explained that it was irrelevant when Mr. Turner acquired the information at issue because, in the case of the motion filed by AUSA Curry, the motion was filed less than one year after sentencing.

investigation and, unlike Judge McBryde, gave the attorneys involved an opportunity to explain themselves. After its investigation, the OPR cleared AUSAs Martin, Curry, and Roper of any wrongdoing or ethical violations.

Nevertheless, the experience was deeply upsetting to those involved, particularly AUSA Martin about whom the charges of fabrication were made. AUSA Martin eventually asked AUSA Roper to speak with his wife about this incident. AUSA Gartner spoke with Martin at length on several occasions and described him as "distraught" over the Turner incident. According to Gartner, Martin or the U.S. Attorney in Mississippi indicated to him that Martin had hardly eaten anything or slept for several days as a result of the order issued by Judge McBryde.

17. Burgos Trial

Michael Heiskell graduated from law school in 1974, served as an Assistant District Attorney in Galveston County for five years and as an Assistant U.S. Attorney in Dallas for four years. He has been in private practice in Fort Worth since 1984, specializing in criminal defense work, is Vice President of the Texas Criminal Defense Lawyers Association and on the Board of the Tarrant County Criminal Defense Lawyers Association.

In November 1996, Heiskell represented Dr. H. Burgos in a trial before Judge McBryde. Burgos, 70 years old and in poor health at the time of the trial, was charged with submitting false bills to insurance companies. Burgos faced a possible sentence of eight to ten years.

On November 5, 1996, Election Day and the second day of the trial, Heiskell had six or seven witnesses, in addition to Dr. Burgos, standing by ready to testify. The witnesses included a doctor and a local police chief. Heiskell's trial strategy from the outset was to call the other witnesses, all expected to be short witnesses, first and to have Dr. Burgos testify at the end of the defense case. That way, under Heiskell's trial plan, the jury would hear reputation testimony about Dr. Burgos, expert testimony regarding medical billing practices and certain other factual information; then, Dr. Burgos, the most important witness, would testify as both a fact witness and summary witness and the jury would hear his denial of the allegations last

before deliberations. Heiskell had discussed this strategy with his staff, and with Dr. Burgos and Mrs. Burgos.

Over the noon hour, Heiskell asked the Assistant U.S. Attorney, Ron Eddins, how long the government's case would take. Eddins indicated he would present evidence until 6:00 or 6:30 p.m. and might not be able to complete his case by that time. Heiskell's witnesses had wanted to know when they would testify. The doctor had patients to attend to, others were concerned about going to vote and getting home before dark and the police chief had professional obligations. In light of Eddins' schedule, Heiskell released these witnesses at noon or shortly after, telling them to report back to court Wednesday morning.

Somewhere between 3:45 and 4:00 PM, the Court asked Eddins if he would finish "about 6:00 or so". Eddins answered, "I don't think we can". Nevertheless, the Court directed Mr. Heiskell to "have one or two witnesses ready in case we do get there". In response, Heiskell had his investigator and paralegal contact the witnesses released earlier. As it turned out, the doctor was seeing a patient, and the other witnesses could not be located.

At about 6:00 p.m., the government completed its case, and the following occurred:

> "MR. HEISKELL: Judge, can I start in the morning?
>
> THE COURT: Do what?
>
> MR. HEISKELL: Can I start in the morning, Judge?
>
> THE COURT: No. Let's move on. I've got that other case coming. Let's move on. Move on." (Exhibit C-124, at 630.)

Heiskell described the Court's demeanor during this exchange as "very stern." (Heiskell, TR: 1348.)

Heiskell complied with the instruction to "move on" and called Mrs. Burgos to the stand. During her direct examination, Heiskell was under time pressure from the Court. The examination of Mrs. Burgos ended around 6:15 p.m. at which time the following took place:

> "MR. HEISKELL: Your Honor, may we approach for a minute, please?
>
> THE COURT: Yes.
>
> (Bench conference with Mr. Eddins and Mr. Heiskell:)

MR. HEISKELL: The only other witness I have, Your Honor, is the doctor. And I have about five witnesses, short witnesses, tomorrow before I call him. And I would like to call him at the end, Your Honor, because —

THE COURT: Go ahead and call them now.

MR. HEISKELL: I'm sorry, Judge, they're not here.

THE COURT: Well, you'll have to put him on if you want to use him as a witness.

(End of bench conference.)" (Exhibit C-124, at 649-50.)

Heiskell was cut off before he could explain to the Court why he wanted to call Burgos at the end. When asked in proceedings before the Committee why he did not go back and urge his position on the Court more vigorously, Heiskell stated:

"Well, again, as I stated earlier, I didn't want to incur the wrath of the court in front of a jury. I'm very mindful that, in being very assertive and vigorous with the court, the court will be very short and stern and reprimand you in front of the jury in such a fashion that not only is it embarrassing to counsel, but it's not helpful, in my opinion, to my client when they see the court acting such a way toward the defendant and his counsel." (Heiskell, TR: 1352)

Thus the Court required Heiskell, at 6:15 p.m., to scrap his trial strategy and call to the stand the 70 year old Burgos, who was by that time in the trial day "exhausted."

After two pages of background questioning of Burgos, the Court interrupted and asked, "how long do you think your questioning of this witness will take". This question was asked about the defendant in the case, who faced eight to ten years in prison and whom the Court had just required to take the stand.

After another seven pages of testimony (approximately 15 minutes after Dr. Burgos took the stand), the Court called Heiskell to the bench, confirmed that the defense had five other witnesses, and then stated: "Well, we can't get all that done tonight, so why don't we take a recess and come back in the morning. How long do you think those will take? Are they real short?" (Heiskell, TR: 1354.) After this exchange, the jury was

sent out for the day at 6:30 p.m. The reason the Court gave for adjourning was that, with several other witnesses to be heard, "we can't get all that done tonight." Yet the fact that there were several witnesses who had to testify and thus that the trial could not be completed that night was the very information Heiskell had provided before the Court forced him to call Burgos to the stand, out of order, for 15 minutes of testimony.[35]

The Committee finds this incident of concern for two reasons. First, Mr. Heiskell, an experienced and respected defense lawyer, made the judgment that, after being cut off by the Court, he could not risk going back to explain his reason for wanting to call Burgos last. He decided that the potential harm to his client of counsel being reprimanded in front of the jury was too great.

Second, the Court, without letting counsel explain why, overrode Heiskell's request to call the defendant last. No discernible objective was achieved by this action. The Court was aware the proceeding, with a number of additional witnesses to testify, could not be completed that evening. And in fact, the proceeding was recessed after 15 minutes of additional testimony.

18. Burgos Sentencing (January 1997)

In November 1996, Dr. Hernan Enrique Burgos was tried and convicted of mail fraud in a trial before Judge McBryde. Sentencing for Dr. Burgos was set for January 31, 1997 at 9:30 AM. Ten days prior to the sentencing, Arch McColl replaced Michael Heiskell as Dr. Burgos' attorney.

On January 28, 1997, a telephone conference was held during which Mr. McColl informed Judge McBryde that he planned to file a motion for a continuance of sentencing based upon the serious medical condition of Dr. Burgos, in particular his need for hernia and prostate surgery. The following day, Mr. McColl filed a motion for a continuance, which he supplemented on January 30, 1997.

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[35] Heiskell did not ask, when the trial resumed the next morning, to break in on Burgos' testimony to permit the other witnesses to testify because he decided it would "upset the flow of how the jury was receiving the evidence." (Heiskell, TR: 1356.)

Mr. McColl received no word on the motion for a continuance until approximately 4:50 PM on January 30. At that time, Judge McBryde's chamber informed Mr. McColl that a hearing would be held the next morning at 9:00 AM to consider his motion for a continuance. Only live testimony would be considered at this hearing.

Since the motion for a continuance was based upon Dr. Burgos' medical condition, Mr. McColl immediately endeavored to locate a physician who could testify on Dr. Burgos' behalf concerning the need for hernia and prostate surgery. The general surgeon, Dr. Busch, told McColl that he would be available by telephone the next morning between 9:00 AM and 9:30 AM, but that he could not appear in court as he had a presentation to give in Houston that morning.

Accordingly, at 8:30 AM on the morning of the hearing, McColl filed an emergency motion for a telephone conference between 9:00 AM and 9:30 AM.

McColl then proceeded to Judge McBryde's courtroom for the scheduled hearing. Judge McBryde began by calling several other matters. At 9:16 AM, when the court completed one of these matters, Mr. McColl addressed the court:

> "THE COURT: Okay. Let's go back to the cases set for arraignment.
>
> MR. McCOLL: Excuse me, Your Honor. Arch McColl for Dr. Burgos.
>
> THE COURT: You may be seated, Mr. McColl. I'm in the process of handling other cases. Would you please be seated.
>
> MR. McCOLL: I just wanted to inquire of the Court --
>
> THE COURT: Pardon me, Mr. McColl. Be seated while I proceed with other cases, and when I reach your case I will call you.
>
> MR. McCOLL: But it's an emergency, Your Honor.
>
> THE COURT: Pardon me. What is the emergency?
>
> MR. McCOLL: The emergency is that a doctor who is available to the Court to give medical information about the pending motion has made himself available from 9:00 to 9:30 because he could not, on such short notice, be here.

So I filed a motion this morning, Your Honor, detailing all this. And you may not have seen the motion, Your Honor.

THE COURT: Okay. You may be seated while I proceed with the other matters before the court.

MR. McCOLL: Thank you, Your Honor." (Exh. C-85, at 3-4.)

Judge McBryde then proceeded with another matter for several minutes more. At the end of this matter, Mr. McColl stood up again and attempted to explain the situation. Judge McBryde responded by having the bailiff escort Mr. McColl out of the courtroom:

"THE COURT: The next case I'm again calling for arraignment is No. 4:96-CR-066-A.

MR. McCOLL: Excuse me, Your Honor.

THE COURT: United States of America —

MR. McCOLL: I have to —

THE COURT: If you continue to interrupt me, I'm going to have to take some action, so would you please be seated so I can go forward with the matters that I have scheduled to be dealt with.

MR. McCOLL: Yes, sir, but I have to ask this.

THE COURT: Pardon me, sir. Please be seated.

MR. McCOLL: I have to ask this.

THE COURT: Would you please take him out in the hallway while I continue on with other matters that need to be dealt with before the court.

MR. McCOLL: I would like to ask —

THE COURT: You're being taken into the hallway until I conclude other matters and call your matter.

(Mr. McColl leaves courtroom.)" (Exh. C-85, at 6-7.)

Mr. McColl testified that he was "absolutely stunned" by Judge McBryde's order. (McColl, TR: 844.)

Following this incident, Judge McBryde proceeded with another arraignment. When he eventually turned to the Burgos matter, Judge McBryde questioned Mr. McColl at length concerning why he did not subpoena Dr. Busch to appear in court that morning:

"THE COURT: Mr. McColl, did you try to subpoena him to cause him to be here?

MR. McCOLL: Your Honor, I got the order from the Court at ten minutes until 5:00.

THE COURT: Listen to my question, Mr. McColl. Did you try to subpoena the doctor to cause him to be here today?

MR. McCOLL: You mean through the clerk's office in Fort Worth?

THE COURT: Did you try —

MR. McCOLL: I don't understand your question, Your Honor.

THE COURT: Do you know what a subpoena is, Mr. McColl?

MR. McCOLL: From a Fort Worth district clerk?

THE COURT: Do you know what a subpoena is that requires a person to appear at a hearing to give testimony?

MR. McCOLL: As I understand it —

THE COURT: And did you try to subpoena the doctor you're now referring to, to be in attendance at this hearing?

MR. McCOLL: Well, as I understand it, it was impossible —

THE COURT: Can you answer that question, Mr. McColl?

MR. McCOLL: In ten minutes, I could not go to Fort Worth to get a subpoena.

THE COURT: Listen real close, Mr. McColl, to my question and just answer my question. Did you try to subpoena this witness, the doctor you're referring to, to be present this morning to give testimony?

MR. McCOLL: Because I thought that would be absolutely impossible, I tried to get him here by telephone.

THE COURT: Did you try to subpoena him, Mr. McColl, to be here this morning?

MR. McCOLL: I concluded as an officer of the court that that would be a fruitless and vain act . . . ." (Exh. C-85, at 13-15.)

Mr. McColl interpreted Judge McBryde's questions concerning whether he knew what a subpoena was as "sarcastic."

In the end, Judge McBryde agreed to assume that Dr. Busch would testify that it was urgent for Dr. Burgos to have

hernia surgery. Nevertheless, Mr. McColl testified that he felt that his treatment during the January 30 hearing was "humiliating" and "demeaning."

19. Lonnie Woods Sanction (June 1997 to present)

The Special Committee heard testimony regarding a very recent episode in which Judge McBryde held an attorney, Lonnie Woods, in contempt and then, after an appeal was filed, he withdrew the contempt order and directed that Woods be prosecuted for contempt and possible ethical transgressions, implying that should Woods testify in his own defense at the rescheduled hearing he would be subject to an additional perjury charge.

Mr. Lonnie Woods was representing Mr. Hubbard in a plea hearing before Judge McBryde on June 13, 1997. An issue arose as to the voluntariness of Mr. Hubbard's plea, and Judge McBryde decided to bring in another lawyer to counsel Mr. Hubbard on that issue. In order to have another attorney meet with Mr. Hubbard, Judge McBryde recessed the hearing. The transcript reflects the following:

> "THE COURT: I'm thinking about the possibility of appointing another lawyer just to confer with him and Mr. Woods, and then to confer with him out of the presence of Mr. Woods, on the issue of the voluntariness of his plea. And to do that soon, because we're going to try to —
>
> Well, okay. I'm going to get another lawyer. He'll be taken back downstairs. You stay downstairs, Mr. Woods. I'm going to get another lawyer as soon as I can get one over here to confer with your client and then to discuss the matter with you, and then we'll be back up here at 12:30.[36]
>
> MR. WOODS: 12:30.
>
> THE COURT: We've got other things so we're going to have a close schedule, but I'll get another lawyer up here and talk to you.

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[36]The Special Committee listened to the audio tape of the proceedings and reviewed the relevant portions of the transcript. Although the written transcript indicates that there is a comma after the word "downstairs," on the audio tape from which the transcript was prepared there is a noticeable pause after the word "downstairs."

Mr. Hubbard, I'm going to get another lawyer up here that I'm going to appoint for you for the limited purpose now of being sure that you really want to enter a plea of guilty and that you're not entering a plea of guilty just because you don't have confidence in Mr. Woods or you don't like the way he's treated you or something like that. You be candid with that lawyer. You be honest with him and tell him everything he wants to know. Then I'm going to have all of you come back here at 12:30 and we're going to talk about where we go from there." (Exh. C-114, at 30-31.)

Although the hearing resumed on time, Judge McBryde, sua sponte, decided to conduct a contempt hearing in order to determine whether he should hold Mr. Woods in contempt for failing to wait downstairs for the other attorney to arrive. Mr. Woods explained that he did not understand that Judge McBryde had ordered him to wait downstairs:

"Before he's taken down, I want to explore a little bit further about what happened during the noon hour.

Mr. Couch, about what time did you arrive at the courthouse?

MR. COUCH: I believe it was about quarter to 12:00. No, I'm sorry, about 11:30.

THE COURT: And when did Mr. Woods arrive?

MR. COUCH: About 15 minutes later.

THE COURT: Okay. Fifteen minutes after you arrived or after you had completed your conversation with the defendant.

MR. COUCH: Probably 15 minutes after I had completed my conversation with Mr. Hubbard.

THE COURT: How long after you arrived was it that Mr. Woods arrived.

MR. COUCH: I would say 25 minutes.

THE COURT: Okay. About what time are you talking about?

MR. COUCH: I would say about 12:10, possibly.

THE COURT: Okay. You can be seated.

Mr. Woods, tell me again why you didn't stay here at the courthouse.

MR. WOODS: First of all, Your Honor, as I had said, I didn't understand the stipulation that I remain. Otherwise, I would have no problem with that. Just before we adjourned, I asked you if 12:30 we reconvene. I was asking that for clarity in my mind that that's when I was due back here.

When I left here, I had two courts to check by. I did go by the 372nd and filed a motion for continuance. I did check by the 231st where I was scheduled for trial this morning at 9:00 o'clock to inform the judge that I was in this hearing, even though I did call. And as soon as I did that, I went to my office at that time and received a phone call and came right back.

THE COURT: Let me back up. Mr. Woods, I think in fairness to you I'm considering holding you in contempt of court for failure to comply with my order, and we're having a hearing now on that possibility. So you back up and start over again and say anything you want to say, bearing that in mind. We're having a hearing to determine whether I hold you in contempt of court for violating my specific direction that you stay downstairs with Mr. Woods (sic).

Okay, go ahead. You can incorporate what you've already said if you would like.

MR. WOODS: I would say the same, that I didn't understand the direction. To me I felt you were informing the defendant that he was to remain with the U.S. Marshall until we reconvened at 12:30. Had I understood that, I would have asked if it was okay for me to leave to at least check with the two courts, which I was due to report.

THE COURT: Okay. Do you have anything else you want to say on the subject we're now having a hearing?

You can be seated, Mr. Hubbard.

MR. WOODS: That's all the information I have, Judge." (C-114, at 48-50.)[37]

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[37]Mr. Woods did not have the benefit of the transcript or a tape recorder to play back Judge McBryde's oral directive, but could only rely on what he heard Judge McBryde say at the time, stated a single time at the end

Judge McBryde refused to accept Mr. Woods' explanation, and the following colloquy ensued:

> THE COURT: Okay. Do you have anything else?
>
> MR. WOODS: No, sir.
>
> THE COURT: Okay. I hold you in contempt of court for violating my directive that you stay downstairs while we had another attorney come up here. I'm fining you $500. I'm ordering that that be paid to the United States District Clerk before the end of the day.
>
> I'm also ordering that you will reimburse the government for any fees that Mr. Couch collects by virtue of having been required to represent your client.
>
> MR. WOODS: May I inquire as to you're making that finding?
>
> THE COURT: Pardon?
>
> MR. WOODS: May I inquire as to why your making that finding?
>
> THE COURT: What finding?
>
> MR. WOODS: Of contempt.
>
> THE COURT: Because you consciously violated an order of mine that you stay downstairs while we were resolving the issue of whether your client wanted to enter a plea of guilty and the other things that we're talking about.
>
> MR. WOODS: So it is your belief that I heard you —
>
> THE COURT: I'm not going to be subjected to your cross-examination, Mr. Woods.
>
> MR. WOODS: I just wanted to ask, Your Honor. I'm just asking a question.

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of the hearing. While it seems plain from reading the transcript that Judge McBryde had directed Mr. Woods to remain downstairs, a review of the audiotape indicates to the Special Committee that one could argue that Judge McBryde's order was ambiguous. We do not decide here whether Mr. Woods was in fact ordered to wait downstairs. We also do not decide here whether, if this was what the order entailed, Mr. Woods did or did not understand this order. Even if the order was unmistakably clear, we find Judge McBryde's subsequent treatment of Mr. Woods unconscionable under the circumstances.

THE COURT: You consciously violated my order is my finding.

MR. WOODS: So you believe that I heard you.

THE COURT: And I'm more satisfied of that when you tell me there was another person in the court who heard my order and you discussed with him what I said, apparently.

MR. WOODS: I just said I had to be back —

THE COURT: And it's just incomprehensible to me that neither one of you would have understood what I said. So I believe you're not telling me the truth, in addition to violating the order.

MR. WOODS: One more thing, Your Honor. Since we're having a hearing, is it possible for me to request a transcript of whether or not my name was called specifically in that direction? Is that a fair request?

THE COURT: Yes, and it will be marked Exhibit A to the hearing. It will be a court's exhibit. I'll call it Court's Exhibit 1.

MR. WOODS: Do you understand my request? That prior to the adjournment when you were making the direction to remain until 12:30 that you called my name out.

THE COURT: Did it not sound to you like I did?

MR. WOODS: That is correct.

THE COURT: When I said, "You remain here," you didn't think — Or when I said, "You stay downstairs," you didn't think I called your name?

MR. WOODS: No, sir." (Exh. C-114, at 52-54.)

Mr. Woods filed a notice of appeal on June 23, 1997. Two days later, Judge McBryde issued an order setting aside his previous contempt order, but directing that another hearing be held on the contempt matter and also to determine whether other disciplinary action under the Local Criminal Rules should be taken against Mr. Woods. Judge McBryde directed that the U.S. Attorney's Office be brought in to prosecute Mr. Woods with respect to these matters.[38] The reason provided by Judge

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[38] Mr. Roper, the AUSA assigned to prosecute the matter, was not

McBryde for setting aside the contempt order was that "[a]n argument might reasonably be made that the undersigned judge served as a prosecutor, as well as the judge, in the matter of determining whether Woods was guilty of contempt." (Exh. C-117.)

Judge McBryde's order went on to state that at the hearing he would consider Mr. Woods' conduct in failing to stay downstairs, as well as the testimony Mr. Woods had previously given in explaining his position. In addition, Judge McBryde went on to state that he would take into account any future testimony Mr. Woods might give at the hearing to consider the charges of contempt and violations of the local criminal rules. In addition to whatever sanctions Judge McBryde might deem appropriate with respect to the contempt charge, a finding that Mr. Woods violated the local criminal rules exposed him to disbarment.

Mr. Heiskell, who is defending Mr. Woods in this matter, testified before the Special Committee and explained that he interpreted Judge McBryde's statement that he would consider any testimony Mr. Woods might give in his defense as a threat that Judge McBryde would find Mr. Woods guilty of perjury if he so testified. Judge McBryde had already found that Mr. Woods' statement that he did not understand that Judge McBryde ordered him to wait downstairs was untruthful.

> "What I read from that statement is since the court had already prejudged, if you will, his credibility or judged his credibility and found him to be untruthful, that any testimony that he would give would again have Mr. Woods in that crossfire of the court regarding his incredibility, if you will, of testimony. It would subject Mr. Woods not only to further orders of contempt, potentially, but also a potential referral to the U.S. Attorney or grand jury as a perjurer. So I was looking at it from that standpoint of the predicament Mr. Woods was in by giving any further testimony, the chilling effect it would have on him." (Heiskell, TR: 1370.)

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enthused about it and conveyed that to Mr. Heiskell. At the hearing on the matter, Mr. Roper simply introduced the transcript and then rested.

As a consequence of this concern, Mr. Heiskell decided not to call Mr. Woods to testify at the contempt hearing.

On behalf of Mr. Woods, Mr. Heiskell moved to disqualify Judge McBryde, arguing that:

> "In the Court's order to set aside the June 25, 1997 [order], two days after Woods appealed the original contempt order, the Court also took the extraordinary step of scheduling a disciplinary hearing against Woods, at the same time, based on testimony Woods has given or will give at said hearing, as well as his alleged failure to obey the command of the Court. This once again raises the specter of the Court's impartiality as to how it can fairly and reasonably view Woods' testimony at the scheduled hearing. It also serves as a chilling effect on Woods' potential testimony." (Exhibit C-118, at 3.)

Judge McBryde denied the motion for disqualification, and conducted a hearing on July 10, 1997. Mr. Woods did not testify at the hearing. The matter is still pending.

Judge McBryde objected to the Committee's even hearing evidence on this matter because it was sub judice before him. The Committee does not purport to decide whether, in fact, Mr. Woods was in contempt of court for failing to remain downstairs at the Fort Worth courthouse. Instead, the Committee considers this incident as part of a pattern on Judge McBryde's part of overreacting to perceived slights and infractions and of commencing unduly complicated and disruptive procedures to investigate apparently innocuous events. Here, the alleged infraction, even if proven, seems quite minor and does not appear to have inconvenienced the court in any way. Nevertheless, an attorney was subjected to serious charges of misconduct and he was forced to hire an attorney. The U.S. Attorney was ordered to prosecute this attorney and the attorney was threatened with an additional charge of perjury if he testified on his own behalf. These developments seem entirely out of proportion with the underlying alleged infraction and suggest a failure on the part of Judge McBryde to exercise restraint in the application of his judicial power.

Counsel for Judge McBryde declined to cross-examine Mr. Heiskell on this matter. Nevertheless, Judge McBryde did

attempt indirectly to justify his conduct by offering the testimony of John Vasquez. Mr. Vasquez, an investigator for the Texas State Bar, testified that the Texas State Bar had questioned Mr. Woods' integrity in a number of unrelated matters and had sanctioned him on several occasions. We do not consider this testimony a defense for Judge McBryde's conduct, particularly since there is no evidence that Judge McBryde was even aware of the list of Mr. Woods' ethical transgressions (as testified to by Mr. Vasquez) at the time of the above described incident. Even if he did, Mr. Woods' behavior in other matters would not justify Judge McBryde's treatment of him in this matter.

20. Relations and Interactions with Northern District Judges

(a) "Be Patient" Incident (December 1994)

Judge McBryde's interactions with his fellow judges in the Northern District of Texas have been strained to say the least. An incident in December of 1994 exemplifies the troubling status of Judge McBryde's relationship with Judge Terry Means in particular.

There was a meeting of the judges of the Northern District of Texas in Dallas. Judge Woodward, Judge Mahon, Judge Means and Judge McBryde decided to travel from Fort Worth to Dallas together in Judge McBryde's Range Rover. Judge Means and Judge Mahon were in the backseat of the vehicle; Judge Woodward was in the front passenger seat, and Judge McBryde was driving. Judge Mahon and Judge Means both described engaging in playful banter with one another on the drive from Dallas to Fort Worth.

When the judges approached the Dallas courthouse, Judge McBryde elected to take a well-known shortcut through an adjacent parking lot. Judge McBryde began to proceed through the parking lot, but was forced to stop behind a car that was discharging passengers. Rather than waiting for the car to clear, Judge McBryde began to pull around the car. This prompted Judge Means, who was concerned about the safety of the passengers who were exiting the car, to say to Judge McBryde something to the effect of: "John, now, let's be patient here. I

know that's not a virtue you've cultivated, but let's be patient here." (Means, TR: 691.)

When they reached the courthouse, Judge McBryde approached Judge Means, out of earshot of Judges Mahon and Woodward. Judge Means recounted Judge McBryde's comments as follows:

> "He said, 'Terry, I don't appreciate that comment about patience and virtue. I don't need that kind of crap out of you.
>
> I was stunned and I said, 'Well, John, I was just teasing,' and he said, 'It doesn't matter if you are teasing or not. I don't need that kind of crap out of you.'" (Means, TR, 692.)

Judge Means testified that Judge McBryde's demeanor was harsh and angry and his face was flushed during this exchange. In his testimony before the Special Committee, Judge McBryde did not dispute that Judge Means had made some comment about Judge McBryde's lack of patience; that he knew it was made in a "bantering way;" and that he had taken offense to it and told Judge Means so. Judge McBryde disagreed, however, with Judge Means' characterization of his reaction.[39] Judge Mahon testified that, although he did not hear what Judge McBryde said to Judge Means, immediately after the incident Judge Means recounted to him Judge McBryde's comments in terms essentially identical to those quoted above.[40] The Committee credits Judge Means' testimony concerning this incident as it is consistent with what he told Judge Mahon at the time.

Although the incident appears minor, both Judge Means and Judge McBryde indicated to the Committee that it was the

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[39] According to Judge McBryde, he said: "Terry, I don't appreciate your remark about my lack of patience." (McBryde, TR, 1044.) He denied using the word "crap" and testified that Judge Means responded to him by saying: "Judge, you need to get your head straightened out." (Id. at 1045.)

[40] According to Judge Mahon, Judge Means quoted Judge McBryde as follows: "I'm not going to put up with stuff like that. I'm not going to hear any more of that kind of crap." (Mahon, TR, 752.)

initial source of the ongoing bad will between the two. Not only did Judge Means' "bantering" comment offend Judge McBryde at the time, but it festered during the ensuing months and years.

(b) "Despicable" Incident (March 1997)

Judge Mahon recounted a recent incident reflecting Judge McBryde's strained relations with his fellow judges. In March 1997, the Fort Worth judges held a meeting to discuss security issues at the courthouse. Judge Mahon thought that convening the judges on a regular basis would be a good idea, so at the end of the meeting he suggested that the judges consider having lunch together occasionally to discuss issues of mutual concern or interest. Judge Mahon's suggestion prompted an angry attack by Judge McBryde. As Judge Mahon testified:

"Q: What happened?

A. Well, Judge McBryde said, 'I can't believe that you would be bringing up something like this, making such a suggestion, in view of the way y'all have talked about me as a judge.'

Q: Who was he talking to?

A: Well, I was the only one that had been talking, but he did say, 'Well, the way y'all have been talking about me as a judge.' He turned and looked at Judge Means and said, 'You are despicable.' Then he turned to me and said. 'You, too, are despicable. Both of you are despicable.'

He was standing up and I could tell he was very agitated and I began to try to soothe things. I said, 'John, I didn't mean anything personal by this. I was just suggesting that maybe it would be helpful for us sometimes to have open discussions about some of these matters." (Mahon, TR: 757.)

Judge McBryde disputed that he turned to Judge Means and Judge Mahon separately and called each one (and then both) "despicable," although he admitted calling both Judge Means and Judge Mahon despicable together. Judge McBryde testified that this reaction was the result of a number of factors, including that Judge Mahon had supported Judge Buchmeyer's decision in May 1995 to reassign the Satz and Torres cases from Judge McBryde to himself; that Judge Mahon had provided informa-

tion detrimental to Judge McBryde to counsel for the Special Committee; and that Judge Means had written a highly critical letter concerning Judge McBryde, which Judge McBryde believed completely unjustified and to which Judge McBryde believed Judge Mahon had contributed. Judge McBryde indicated that he thought his lashing out at Judges Means and Mahon was warranted under the circumstances, although he said he regrets having called Judge Mahon "despicable."

Judge Mahon made an effort, through his proposal for lunch, to take a constructive step to improve the seriously deteriorated relationship between Judge McBryde and the other Fort Worth judges. Judge McBryde's conduct in response to Judge Mahon's effort is of great concern because it indicates not only a rejection of Mahon's effort, but a person whose reactions are out-of-control.

(c) Other Interactions

In addition to the "Be Patient" incident and the "Despicable" incident specifically, the Special Committee is disheartened by Judge McBryde's relations and interactions with his fellow judges. The Special Committee heard testimony from two senior judges in the Northern District of Texas, Judge Eldon Mahon and Judge Barefoot Sanders, and Judge Terry Means that each received numerous complaints about Judge McBryde's conduct on the bench from a wide array of lawyers. Both Judge Mahon and Judge Sanders attempted to talk with Judge McBryde privately about his conduct and their concerns, but both were met with rejection.

In their own fashions, Judges Mahon, Sanders and Means all testified that Judge McBryde lacked judicial temperament. Judge Mahon testified that he told Judge McBryde that he should "lighten up." (Mahon, TR: 748.) Judge Sanders testified that Judge McBryde suffered from a "severe case of judgitis" (Sanders, TR: 763) and that he "intimidates people." (Id. at 767.) Judge Means submitted a letter to Chief Judge Politz which directly stated that Judge McBryde lacked judicial temperament.

The Special Committee also heard evidence regarding conflicts between Judge McBryde and Judge Means over administrative matters in the Fort Worth courthouse. Judge

Means expressed concern about Judge McBryde closing the Fort Worth courthouse on several occasions without consultation and Judge McBryde's rejection of a courthouse closing protocol that Judge Means had developed with the other judges.[41] There was also testimony regarding difficulties between the judges during 1995 construction work at the courthouse. Apparently, during the Winter and Spring of 1995, substantial construction work was under way in the courthouse, such that, at various times, the courtrooms of Judges Means and McBryde were either entirely unavailable or in serious disrepair. At one point in this period, Judge McBryde ended up taking the courtrooms of both Judge Means and Judge Mahon (the only major courtrooms available),[42] with the result that Judge Means was forced to conduct a number of arraignments and take a number of guilty pleas in the smaller bankruptcy courtroom. An exchange during these proceedings between a member of the Special Committee and Judge McBryde reveals that with respect to use of courtrooms, Judge McBryde was not always solicitous of his fellow judges' needs or feelings:

> "JUDGE BARBOUR: Have you ever started another case while a jury is deliberating?
>
> THE WITNESS: I do it often.
>
> JUDGE BARBOUR: Do you not use your own courtroom for both cases?
>
> THE WITNESS: Yes. I would not have in this case.
>
> JUDGE BARBOUR: Why?
>
> THE WITNESS: Because I had six defendants and the prosecutor. My courtroom and his courtroom were set up with two tables. We had, I think, six extra tables that we had set up in the courtroom.

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[41] As to courthouse closings, Judge McBryde testified that in one case, he thought Judge Means had left for the day, and in another case, he thought the Clerk's office would check with the other judges.

[42] According to Judge McBryde, his own courtroom was unusable at the time because of the extensive renovations that were under way. GSA employees called by Judge McBryde supported this testimony.

JUDGE BARBOUR: Why couldn't you have used that setup, left it like it was and tried the second case in there?

THE WITNESS: I guess it's conceivable that I could. It did not seem practical when I would have to be bringing people back into that courtroom during the day.

JUDGE BARBOUR: That's what I'm talking about. Why didn't you try the second case in Judge Means' courtroom where you were trying the first case? You were going to have to stop the proceedings in the second case, anyway, to move to the first case.

THE WITNESS: I guess you might have a point. I could have, but it did not seem to be practical to try a one-defendant case where I had a courtroom set up with tables for a six-defendant case, but I guess that's possible. Nobody suggested that. Had Judge Means suggested that, I might have considered that possibility." (McBryde, TR: 2102.)

B. Trial Practices

In addition to the individual incidents described above, the Special Committee found equally troubling testimony regarding the manner in which Judge McBryde conducts trials. The combination of Judge McBryde's trial practice rules and their often harsh application impedes the ability of many attorneys to try their case effectively and also creates a chilling and stressful environment.

1. Judge McBryde's Rules

Judge McBryde has a number of trial practice rules which govern the conduct of trials in his court. One rule is the requirement that the parties enter into a stipulation with respect to each and every uncontested fact in the case. Typically, these stipulated facts are read seriatim to the jury at the beginning of the case and may not be referred to again later in the proceeding. These facts are not connected to one another when presented to the jury, but are simply recited to the jury at the outset of the case. In some instances, this procedure takes a considerable length of time. For example, in the Coleman v. City of Grapevine case concerning which the Special Committee heard evidence, the recitation of the stipulated facts required thirty-eight pages of the trial transcript. In Taylor v. Charter Medical

Corp., the recitation required eighteen pages of the trial transcript. Often, such a recitation involves numerous facts, ranging from the mundane and trivial to the important.

As noted, Judge McBryde couples the procedure of reading the stipulated facts to the jury with a prohibition against alluding to any of the stipulated facts or eliciting testimony that touches upon any stipulated fact during the trial. Thus, in order to abide by Judge McBryde's rule in this regard, lawyers while questioning witnesses are required to be cognizant at all times of which facts are part of the stipulation and which are not. Lawyers are also forbidden under the rules to provide context for their questions or for facts they consider important.

Another rule governing trial practice in Judge McBryde's court is the prohibition against asking questions on cross-examination similar to questions asked of the witness on direct examination in order to test the testimony of the witness or to lay a foundation for impeachment. Judge McBryde views such questions as "repetitious" or "argumentative" and seeks to curtail the examination if he believes the questioner has repeated or is about to repeat a question in a different way. This rule is applied even to key witnesses. The following excerpt from the Mizell trial in which the defense attorney is attempting to impeach the government's main witness against his client by bringing out that the witness was receiving a reduced sentence in return for his testimony is indicative of the rule as applied by Judge McBryde

> "Q. And you understood that [a gun count adds five years to your sentence] when you were negotiating with the government, when you were telling these stories to the government, did you not sir?
>
> A. I'm sorry?
>
> Q. You understood —
>
> THE COURT: Mr. McCown, let's don't repeat the question. Let's go to another question.
>
> MR. McCOWN: Sir, he has not answered that.
>
> THE COURT: I think he has answered that adequately. Go on to another question.
>
> Q. Did you understand my question, Mr. Turnage?

THE COURT: He has answered your question. Go to another question." (Exhibit C-26, Vol. II, at 85: 10-23.)

Furthermore, an attorney may not set up the background for a question by summarizing prior testimony, either as a precursor for impeaching a witness or simply as a way of refreshing the recollections of the witness and the jury.

In addition, the Committee heard numerous witnesses testify that Judge McBryde's trials are extremely fast. Judge McBryde ordinarily permits only five minutes for opening statements. He often applies a highly technical application of the cumulative evidence rule, barring the admission of documentary evidence and oral evidence on the same matter. He rarely permits the use of demonstrative exhibits or drawings and does not ordinarily allow the Government to play tapes in criminal cases, insisting upon reading an agreed-upon transcript.

2. Enforcement of the Rules

Judge McBryde's manner of enforcing his rules is harsh and often humiliating. The Committee's review of the transcripts of numerous trials in Judge McBryde's court and the testimony of numerous witnesses reflect the harsh enforcement mechanisms utilized by Judge McBryde. The Committee heard numerous examples of Judge McBryde's telling lawyers in front of the jury words to the effect: "If you repeat the question, I'll assume you've run out of good questions and you will be seated" or "Ask another question, if you have one." The transcripts of the cases about which witnesses testified, including Judge McBryde's own witnesses, are replete with Judge McBryde's constant admonishments to counsel to move on to something else; not to allude to a stipulated fact; and orders to (or threats to order) lawyers to sit down during openings or the examination of witnesses. Witnesses further testified that the Court's demeanor when issuing such orders or threats aggravates the oppressive atmosphere.

For example, in the Cushman case, Judge McBryde ordered three attorneys, each representing different defendants, to sit down during their opening statements, ostensibly on the ground that their openings were too "argumentative." The same occurred to two attorneys, including Mr. Martin, in the Coleman

case. The following passage from Cushman is illustrative of the manner in which Judge McBryde chastises attorneys in their opening statements:

> "MR. MILNER: May it please the Court. Members of the jury, as you already know, I represent Larry Colton Anderson, the tall, thin individual seated next to me at the counsel table, the one with the prominent indentation in the middle of his forehead.
>
> THE COURT: Do you want to terminate your argument before you start?
>
> MR. MILNER: No, Your Honor.
>
> THE COURT: Let's stick to the appropriate opening statement.
>
> MR. MILNER: Mr. Anderson is charged in Counts One, Two and Three of the 32 Count indictment. Count 1 is the conspiracy you have already heard described by other people here at the podium and which the Government has already read to you.
>
> Counts Two and Three of the indictment are mail fraud counts. By way of laying a predicate for the evidence which I anticipate you will hear, the Government cannot convict Mr. Anderson of these three criminal offenses without proving beyond a reasonable doubt —
>
> THE COURT: Pardon me, Mr. Milner. I'm going to give you one more chance to stick to what you expect the evidence will show rather than argue.
>
> MR. MILNER: I am merely attempting —
>
> THE COURT: Would you — you may be seated. Mr. Burns.
>
> MR. MILNER: Your Honor, may I please —
>
> THE COURT: You may be seated. Mr. Burns, you may come forward." (Exh C-96, at 52-53.)

Judge McBryde ultimately uses the threat of contempt and sarcasm to enforce his rules. The following example from the Mizell trial in which Judge McBryde threatens to hold Frank McCown, the former U.S. Attorney for the Northern District of Texas and a distinguished trial lawyer with forty-five years experience, in contempt for what he perceives as a violation of

his trial practice rules demonstrates the wide range of enforcement weapons utilized by Judge McBryde:

"Q. Was there more than one bedroom?

A. I would assume so, but I didn't go in any of them.

Q. You only went into one?

A. That's it.

THE COURT: Pardon me. I'm going to give you one more chance, Mr. McCown. If you repeat the questions again, then that's going to be my clue that you've run out of good questions, and you are going to be through with your questioning.

FRANK McCOWN: My apologies, Your Honor.

THE COURT: You may proceed. Ask another question, if you have any more.

FRANK McCOWN: I have quite a few.

THE COURT: Okay. Ask another question. And I don't want any side[-]bar remarks from you. You may proceed.

FRANK McCOWN: I did not mean that as a side-bar, Your Honor.

THE COURT: Let me ask the jury to retire to the jury room a minute.

(Jury Out, 12:05 p.m.)

THE COURT: Mr. McCown, I'm going to give you another warning. You know how to conduct the questioning of witnesses. You know you're not to ask the same question over again a different way. You know that you're not supposed to ask argumentative questions. And you know you're not supposed to make comments as opposed to questions. You are supposed to ask questions.

You know that when I tell you to move on and ask a question or to refrain from doing something, that you're not to argue with me about it. If that kind of conduct continues, Mr. McCown, you're running the risk of being held in contempt of Court." (Exh. C-26, Vol. II, at 110-111.)

The Committee heard numerous additional examples of Judge McBryde's interrupting a lawyer during the questioning of a

witnesses or conduct of the trial to enforce one or more of his rules, sometimes in a harsh, threatening, or sarcastic manner.

Judge McBryde called as witnesses a number of lawyers who had tried cases before him. These lawyers testified that they were able to adapt to Judge McBryde's rules and that they were able to try cases effectively before him. According to these witnesses, if attorneys are well prepared, they have few difficulties with Judge McBryde. The following testimony of Mr. Kirk Claunch is illustrative:

> "Q. Could you characterize you experience of trying that criminal case in front of Judge McBryde as a young lawyer?
>
> A. Well, it was my first case as lead counsel and I was prepared. Judge McBryde followed the rules. He seemed in that case very even-tempered. He gave my client a fair trial.
>
> Q. Did you have any particular difficulties in adapting yourself to his courtroom?
>
> A. No. I had had the opportunity to participate in a civil trial in front of Judge McBryde before so I wasn't unfamiliar with Judge McBryde, but he only asked what any other judge asked, which was be prepared." (Claunch, TR: 1676-77.)

AUSA Roper also testified that while he was never comfortable in Judge McBryde's courtroom, after twenty to thirty jury cases he was "used to" appearing before the Judge and was able to try a case effectively before the Judge.[43]

Several of Judge McBryde's witnesses conceded, however, that Judge McBryde's trial practice rules are indeed highly, and often inappropriately, restrictive. Mr. Richard Alley, who testified that he believes Judge McBryde helped him get into law school and whose family is close to Judge McBryde, maintained an incredible position before the Special Committee. He testified that although he is frequently admonished and interrupted by Judge McBryde during trial, he purposefully

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[43] Mr. Roper agreed, however, that it is a judge's responsibility to run a trial that is fair for an attorney who has never appeared in his court before.

causes such interruptions and admonishments in order to emphasize points to the jury. As even a cursory review of the transcripts of the trials about which Mr. Alley testified suggests, the Special Committee finds Mr. Alley's apologetic rationale for Judge McBryde's repeated interruptions and admonishments during the course of trial proceedings to be unsubstantiated and incredible. Mr. Alley finally admitted that Judge McBryde's constant interruptions did indeed bother him and that they could have interfered with his client's right to a fair trial, although he did not believe they had in the particular cases about which he testified.[44]

Another witness for Judge McBryde, James Warren St. John, conceded in a brief he filed with the Fifth Circuit in the Cushman case that Judge McBryde's "limitation of the manner and scope of questioning dampens any attempt at zealous representation within the bounds of law." (Exh. 2 St.J, at 18.) Mr. St. John also stated in his brief that "[t]he threat of being shut down in both direct and cross-examination if the attorney offend[s Judge McBryde's] questioning procedures chilled the effectiveness of the attorneys." (Id. at 6.) Finally, he admitted that most of his colleagues do not want to appear before Judge McBryde, though many had never actually appeared before the Judge. St. John added that he has never seen occur in any other court, state or federal, the things he witnessed in Judge McBryde's court during the Cushman case.

Mr. Herring testified that the restrictions placed on counsel in Judge McBryde's courtroom are greater than in other courts in his experience and that if every judge were as demanding as Judge McBryde (whom he characterized as a "hard-ass") he would have fewer cases or additional difficulties. Similarly, Mr. Franks testified that Judge McBryde's limits on lawyering

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[44] Mr. Alley also acknowledged that he was bothered by a particular incident involving Judge McBryde in the Sotelo case. There, during one day of the trial, Mr. Alley was caught in a traffic jam and called the court to notify Judge McBryde than he was going to be late for the beginning of the trial. Despite Alley's absence, Judge McBryde called in the jury and had them wait silently in the courtroom for ten minutes. Alley felt that this could have been prejudicial to his client.

are more stringent than other judges and that as an advocate he believes those restrictions are unfortunate. Finally, that it is possible for some attorneys on some occasion to adapt to Judge McBryde's rules is not a vindication of these rules. The weight of evidence presented during the hearings convinces the Committee that Judge McBryde imposes unduly stringent rules on advocates and enforces these rules in an often harsh manner. Indeed, his rules so restrict cross-examination that they impede the effective administration of justice.

Judge McBryde also called as witnesses a number of jurors who had participated in trials in which he presided. These witnesses indicated that Judge McBryde was solicitous toward jurors, ran an efficient courtroom, and did not appear to behave in an abusive manner toward attorneys. This testimony is not surprising, however, since the judge is the central authority figure in a trial. Jurors look to the judge to define for them what is proper and improper in the trial context and then expect attorneys to conform to these standards. The problem identified by the Committee's witnesses, however, is that the standards established by Judge McBryde are often inappropriate. That jurors accept these standards only enhances the risk that they will hold attorneys (and perhaps their clients) accountable for "violations" of Judge McBryde's rules, even though the attorneys are utilizing appropriate trial techniques.

3. The Chilling Effect of the Rules
and the Manner of Enforcement

A broad cross section of attorneys, from the experienced to the inexperienced, from prosecutors to public defense attorneys, from civil practitioners to criminal law attorneys, all attested to the oppressive and intimidating atmosphere that pervades Judge McBryde's courtroom. As Judge McBryde's witness, Mr. St. John, argued to the Fifth Circuit in the context of the Cushman case, Judge McBryde's "limitation of the manner and scope of questioning dampens any attempt at zealous representation within the bounds of law." (Exh. 2 St.J, at 18.)

The testimony of lawyers on the chilling and jarring impact of Judge McBryde's conduct of trials is resounding. With respect to Judge McBryde's constant admonishments not to be

repetitious, Mr. McCown described the impact those repeated admonishments had on him as an advocate:

> "Well, quite frankly, I assume that the easiest way to describe it is it sort of rattles you. It's like two or three quick jabs upside the head. What you are trying to do is keep going. Now you have the trial court interrupting you and in some manner you have aroused the ire of the trial court. You are trying to sit there and figure out what you have done there, what's a proper question? You are doing all this knowing that if you do not come up with an answer like bang, bang, bang somebody is going to be saying over your shoulder 'Move along. I assume that you don't have any more questions,' or something of that nature. As far as having any mental process, you don't." (McCown, TR 361-62.)
>
> * * *
>
> "So at that point you get all sorts of things flipping through your mind. How do I protect error? How far can I go with a trial judge and not be in contempt? What do I have to do to be sure I have reversible error? What do I do to get the question out?. . ..
>
> So all of those things are going through your mind at the present time, which leaves you in, again, a state of disrepair as to why the court is doing this, what the problem is, what you have done that is improper, what you can do to repair it. You have not the foggiest of the clues and no experience to rely upon in a capacity in the past that has ever happened to you, so you are bordering on getting to be ineffective." (McCown, TR 363-64.)

David Martin described for the Special Committee numerous examples of what his complaint referred to as "abusive oppression." From his opening statement where Judge McBryde directed him to sit down in front of the jury to his examination of several witnesses during which he was repeatedly interrupted by Judge McBryde, Mr. Martin described why to him Judge McBryde's treatment of lawyers through harsh application of procedural rules is so oppressive:

> "It is like none other than I have ever been in. The judge is your opponent. He's the adversary. You cannot guess

what's going to make him mad. You can't figure out what's objectionable and what's not. You know that you are going to be continually embarrassed and humiliated for having done no wrong. Even if you ask a leading question or even if you ask for inadmissible evidence, the other guy makes an objection and the judge sustains it or overrules it. Not so here. It doesn't matter what you do. You are going to get embarrassed in front of the jury just with the hostility and a malice that is completely uncalled for and absolutely destroys the litigant's ability and right to try the case to the juror." (Martin, TR: 168.)[45]

Dominic Gianna is an experienced attorney with more than twenty years trial experience in courts throughout the country; he has taught trial practice for the National Institute of Trial Advocacy (since 1984) and at the Louisiana State University Law School (since 1991). He testified about the oppressive atmosphere that was pervasive in Judge McBryde's courtroom during a recent trial (April 1997) in which he was counsel for the defendant. Despite obtaining a favorable judgment in the case for his client, a department store accused of wrongful discrimination, Mr. Gianna's experience during trial was difficult because of the manner in which Judge McBryde

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[45]It was apparent to the Special Committee that Mr. Martin has a forceful personality and is indeed a strong advocate for his clients. Through his own witnesses and through cross-examination of Mr. Martin, Judge McBryde brought to the attention of the Special Committee that Mr. Martin's conduct in wholly unrelated matters has been questioned from time to time and that some find him to be overzealous in his representation. We are mindful of the need for a District Judge to control his courtroom. Were Mr. Martin's complaint the only one addressing the manner in which Judge McBryde conducts trials, it would be difficult for us to draw generalized conclusions based on his assertions about Judge McBryde's courtroom conduct, and we would consider that this was an isolated personality clash. Having heard from a number of other witnesses and reviewed transcripts of numerous proceedings not involving Mr. Martin, however, we are struck by the similarity of Mr. Martin's complaints and the complaints of other witnesses who appeared before the Special Committee. We view Mr. Martin's allegations therefore not in isolation, but in light of all the evidence presented to the Special Committee.

conducts trials. From Mr. Gianna's perspective, the cumulative effect of Judge McBryde's trial rules and the manner in which he enforces them affected Mr. Gianna's ability to function effectively as an advocate for his client. The oppressive courtroom atmosphere caused an experienced attorney like Mr. Gianna to skip certain questioning of witnesses because he feared being criticized in front of the jury, and to fail to raise what he believed were valid objections and motions because he was intimidated.

When asked to compare the courtroom atmosphere in Judge McBryde's court with other courts, Mr. Gianna summed up his experience as follows:

> "I found it to be very oppressive. I found it — I observed things. I watched things. It appeared that everyone was walking on eggshells —
>
> I can best describe it as being in a room where you feel the atmosphere is so thick that one is almost afraid to do anything that could result in a comment from the bench." (Gianna, TR: 514)[46]

Other witnesses who did not discuss any case in particular testified generally about the oppressive and chilling nature of Judge McBryde's trial procedure rules and his harsh enforcement of those rules. First Assistant Federal Public Defender Paul Stickney, who has tried more than ten cases before Judge McBryde and supervises several other attorneys who have tried numerous cases before Judge McBryde, testified about the stress caused by Judge McBryde's conduct of trials and proceedings. He also testified that as a result of the way Judge McBryde conducts jury voir dire, his attorneys as a practice decline to ask questions during voir dire because of the fear that the first

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[46] Judge McBryde called as a witness Mr. Gianna's opponent in the Manashirova trial, Jim Franks. Mr. Franks testified that he did not feel intimidated or humiliated during this trial and that he did not perceive that Mr. Gianna was mistreated in any way during the trial. This evidence does not discredit the testimony of Mr. Gianna that he found Judge McBryde's trial practices to be oppressive. Indeed, as noted, Mr. Franks indicated that, as an advocate, he found many of Judge McBryde's limitations on lawyering to be "unfortunate."

impression jurors will have of them will be one of ridicule. Mr. Stickney further testified that he must severely limit his arguments and evidence when trying a case before Judge McBryde because of the way the Judge restricts his ability to structure his case.

AUSA Paul Gartner, who is Deputy Chief of the Criminal Division of the U.S. Attorney's Office in Fort Worth and who has had approximately ten trials in Judge McBryde's court, testified that the atmosphere in Judge McBryde's court is "[e]xtremely tense, very quick-paced" and "intimidating at times." (Gartner, TR: 1306.) He testified that he has been personally intimidated by Judge McBryde into twice taking a position which, in his judgment, he should not have taken.

Michael Heiskell, an experienced criminal defense lawyer, characterized Judge McBryde's effect on him in the following way when asked why he did not pursue an objection more vigorously during the Burgos trial:

> "Well, again, as I stated earlier, I didn't want to incur the wrath of the court in front of a jury. I'm very mindful that, in being very assertive and vigorous with the court, the court will be very short and stern and reprimand you in front of the jury in such a fashion that not only is it embarrassing to counsel, but it's not helpful, in my opinion, to my client when they see the court acting such a way toward the defendant and his counsel." (Heiskell, TR: 1352.)

The chilling effect of the oppressive courtroom atmosphere and its cumulative impact on lawyers who frequently appear before Judge McBryde point not only to the need to remedy the situation, but also to the inadequacy of the appellate process as an appropriate means of redress. The testimony of lawyers demonstrates that the combined effect of Judge McBryde's rules and the manner of their enforcement often results in a decision on their part to forgo action out of either a personally or strategically motivated fear of being humiliated, embarrassed or admonished in the courtroom. Error for the purposes of appeal simply cannot be preserved under those circumstances. Moreover, on what grounds can a lawyer effectively appeal when his or her representation was not as effective as it other-

wise would have been had the lawyer not been more concerned with appeasing Judge McBryde than advocating for his or her client?

4. Reasons for the Special Committee's Concerns

The Special Committee is fully cognizant of the notion that a trial judge should be afforded broad discretion to manage and conduct trials over which he or she presides. The Special Committee is also aware that courts in this Circuit employ various techniques (e.g., time limits, cumulative evidence rules and rules regarding the scope of cross-examination) in trial management. Nonetheless, the Special Committee feels compelled to address the manner in which Judge McBryde conducts his trials for several reasons. First, Judge McBryde's extreme and unduly restrictive rules (and the manner in which they are applied) are different not only in degree but also in kind from the wide array of acceptable trial management rules. Second, the Committee did not merely hear evidence about difficulties in an isolated or aberrant trial. It heard evidence of a pattern of procedures and enforcement techniques with respect to numerous trials spanning the length of Judge McBryde's tenure on the bench. Third, the sweeping and chilling effect of Judge McBryde's trial practices suggests that the Council may be the only forum that can adequately review and seek to redress the totality of harm that has resulted from Judge McBryde's repeated practices in this regard. Finally, the Fifth Circuit has already attempted to convey to Judge McBryde that the cumulative effect of his trial procedures impedes the ability of lawyers to try their cases. See Sims v. ANR Freight System, Inc., 77 F.3d 846, 850 (5th Cir. 1996) ("There is a benefit for the judge to permit lawyers a fair opportunity to present their evidence in the light most favorable to their claim. Unduly restrictive procedures can have a negative impact on the quality of a trial, whether it be a jury trial or a bench trial. Though the procedures that were the basis of this appeal did not result in a reversal of the judgments, we trust that the district court will reevaluate the restrictions on the lawyers' ability to present facts in a comprehensible manner so that reversal in other cases, and the resulting expenses to litigants, might be avoided."). In view

of Judge McBryde's reaction, the Special Committee believes that the Council must act.

C. Judge McBryde's Witnesses

Aside from the trial practice witnesses discussed above, Judge McBryde called a number of other witnesses on his behalf in the course of the hearings before the Special Committee. These witnesses included members of his chambers staff, including his court coordinator, a former secretary, and two former law clerks. These witnesses testified that Judge McBryde was always cordial and considerate in his dealings with them, that he was hardworking and thorough, and that he had never lashed out at them, questioned their honesty, or attacked their loyalty. Judge McBryde also called as witnesses several GSA employees and probation officers, who provided similar testimony.

The Committee has no doubt that Judge McBryde is typically thoughtful and polite in dealing with members of his staff and court personnel. As demonstrated by his behavior toward Nancy Doherty in the Torres case, however, Judge McBryde can be harsh when he perceives that an official of the court system subordinate to him does something that he perceives as questioning his judgment or authority. Furthermore, the fact that Judge McBryde behaves appropriately toward his staff and other court employees does not refute the evidence showing his abusive treatment of attorneys and litigants appearing before him in court.

Judge McBryde also called as witnesses several attorneys who have briefed motions or had short bench trials before him. These witnesses indicated that Judge McBryde prepares thoroughly, addresses motions promptly, and writes scholarly opinions on difficult legal questions. As Jay Doegey, City Attorney for the City of Arlington, Texas testified:

> "In fact, that's the one thing about Judge McBryde you can depend on, is he reads everything thoroughly. He understands it. He is not afraid at all to make law decisions and do it quickly. I appreciate it because to do otherwise, to let those motions for summary judgment sit for weeks and months and you approach deadlines for trial, it doesn't

save you a whole lot of money if we don't get the answers to those critical questions . . . ." (Doegey, TR: 1472.)

Judge McBryde also himself testified about his success in addressing the court backlog problem he inherited when he was appointed and in moving cases expeditiously. The Committee credits the testimony of Judge McBryde and his witnesses on these subjects and has no doubt that Judge McBryde works diligently and addresses matters promptly. This evidence does not, however, respond to, let alone refute, the evidence presented to the Committee concerning Judge McBryde's abusive treatment of attorneys in other contexts.

D. Patterns of Conduct

When viewed in isolation, the incidents described above run the gamut from outrageous to inappropriate. When viewed together, the incidents bespeak several alarming patterns of conduct exhibited by Judge McBryde over the course of his tenure on the bench.

1. Proclivity to Question Integrity

One pattern that emerges is Judge McBryde's proclivity to question the integrity of attorneys appearing before him. Frequently, Judge McBryde has exhibited distrust of attorneys' motives, often directly accusing them of lying or conspiring to deceive him. In the Dawson case, he not only accused AUSAs Claude Brown and Wayne Hughes of engaging in bad faith negotiations and making statements "unworthy of belief," but he also accused the entire Civil Section of the U.S. Attorney's Office in Fort Worth of being less than candid. In Turner I, Judge McBryde's accusations against Assistant Public Defender Tim Henry and the entire Federal Public Defender's Office were similar to Dawson: (i) first, he found deceit by reasoning as follows: a competent lawyer would have done X; you are a competent lawyer; therefore, I find you are lying when you said you did not do X and (ii) then he denigrated the entire office of attorneys as being less than candid with the court as a practice. In the Anderson case, he accused AUSA Fred Schattman of "bad faith" because Mr. Schattman argued that the U.S. Attorney's Office should live up to its part of a plea agreement, just as he accused the SEC of "bad faith" for standing on principle in Van Waeyenberghe. Further, Judge McBryde indicated to

Federal Public Defender Ira Kirkendoll during a 1993 meeting that he was concerned that the U.S. Attorney's Office and the Federal Public Defender's Office were engaged in a conspiracy to subvert the Sentencing Guidelines.

In Turner II, Judge McBryde wrote that AUSA William Martin's representations regarding the cooperation of Mr. Turner were "less than candid, if not fabrications in whole or in part" simply because he assumed, without consulting Martin, that notes detailing the cooperation must exist.[47] In Satz, Judge McBryde accused both AUSA Darcy Cerow and Postal Inspector Whiteaker of lying about the scope of Judge Rosenblatt's sealing order, without taking the simple step of calling Judge Rosenblatt himself as to the scope of the sealing order as he had been urged to do.

Judge McBryde's refusal to take simple steps to verify whether or not his suspicion of bad faith on the part of others is justifiable is also reflected in the Torres, Anderson, and Turner II matters. In Torres, Judge McBryde, without taking the simple step of researching the law, suggested in a public order that Nancy Doherty, a public servant, was conspiring with the lawyer for the minor plaintiff against that minor, merely for her suggestion which was in fact correct that the only remedy for the mistake was the institution of an action under the Federal Tort Claims Act. In Anderson, Judge McBryde found, without inquiring of U.S. Attorney Marvin Collins (whom he required to appear in his court), that the U.S. Attorney's Office was attempting to curry favor with the defendant because of a relationship between an investigator and the defendant. In Turner II, Judge McBryde, without allowing AUSA Martin the opportunity to explain why no contemporaneously drafted notes detailing Mr. Turner's cooperation were found to exist, concluded that Mr. Martin was fabricating the fact of Mr. Turner's cooperation.

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[47] Here, Judge McBryde adopted a rigid analysis similar to that found in Dawson and Turner I: if cooperation occurred, there must be notes; no notes were produced; therefore any claims of cooperation must be "less than candid, if not fabrications in whole or in part."

After imposing a humiliating sanction on Belinda Saulsberry, Judge McBryde either suspected that she had filed a false affidavit detailing her compliance with his sanction order or deliberately wanted to humiliate her further, and required her to file an extensive supplemental affidavit. Judge McBryde accused Assistant Federal Public Defender Matt Golla of purposefully sandbagging him in the Davis case. Most recently, Judge McBryde accused attorney Lonnie Woods of lying concerning his understanding of an order issued by Judge McBryde.

2. Overreactions and Abusive Sanctions

The second noticeable pattern emerging from the evidence gathered by the Special Committee is Judge McBryde's tendency to over react to perceived transgressions of his rules and expectations or intrusions on his authority. Judge McBryde's incarceration of Assistant Public Defender Peter Fleury is one example. Another is his imposition of the Fourth Floor Order. Judge McBryde's sanction of Belinda Saulsberry; his treatment of Judge Mahon, Nancy Doherty, AUSA John Teakell and Arch McColl; his barring of Matt Golla from his courtroom; his ordering of the prosecution of Lonnie Woods for contempt and possible ethical violations; and his threat to hold Frank McCown in contempt during the Mizell trial all reflect an abusive tendency and lack of judicial temperament.

Like his proclivity to question the motives of those appearing before him, this tendency to overreact and to impose disproportionate sanctions makes conducting trials or other proceedings before Judge McBryde extremely stressful on some lawyers. Messrs. Henry, Sanders, and Brown in fact left their respective places of employment in part due to the stress caused by Judge McBryde's tendency to abuse lawyers appearing before him. The Special Committee heard both first and second-hand testimony about how Judge McBryde's sanctions and attacks on lawyers' integrity have had debilitating effects on several competent, well-respected professionals. Experienced trial attorneys told the Special Committee that the manner in which Judge McBryde treated them and other attorneys caused them to be flustered and fearful during trials.

3. Obsessive Need to Control

Another theme that emerges from the evidence is Judge McBryde's need to assert control and impose his priorities on others even where circumstances seem to warrant accommodation and flexibility. Judge McBryde's trial rules — severe restrictions on an attorney's direct and cross-examination of witnesses; his five-minute openings; and his use of stipulated facts — and their sometimes harsh and rigid application are perhaps the clearest reflection of his need to control all aspects of proceedings around him.[48] For example, Judge McBryde's insistence in the Burgos case that Mr. Heiskell call the defendant to the stand after 6:00 p.m. for fifteen minutes of testimony, even though Mr. Heiskell's trial strategy was to have his client testify last, reflects the fact that Judge McBryde is motivated by considerations of speed and control with no apparent thought to consequences.

In addition, his need to assert control and priority over other persons and proceedings underlies a number of the specific incidents about which the Special Committee heard evidence. The Fourth Floor Order is a paradigmatic example of Judge McBryde's need to control attorneys appearing before him. As a consequence of one attorney's justifiable forty-five-minute unavailability for a jury verdict, Judge McBryde imposed a sixteen-month restriction on the actions of all the

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[48] When asked about these procedures, Judge McBryde emphasized that they were not adopted solely to expedite the proceedings. Instead, he indicated procedures such as the reading of stipulated facts and the prohibition on the repetition of prior testimony were adopted based upon his conclusion that they were the best way to present evidence to a jury. Judge McBryde rejected the suggestion that lawyers should be permitted to develop the facts of a case in the manner they see as most effective: "[I]f I didn't have a degree of control over what happens in the courtroom, it would just go amuck." (Id. at 2158.)

Of course, the Special Committee does not dispute that a trial judge has both the responsibility and the discretion to adopt and enforce rules for the effective presentation of evidence. What is striking about Judge McBryde's rules, however, is their rigidity and attention to all minutiae of a case. In Judge McBryde's courtroom, there is simply no room for creativity or diversity in the way a case is presented.

public defenders during jury deliberations. Judge McBryde's treatment of Texas State Court Judge Thomas Lowe bespeaks his need to control his own schedule at the expense of others, as does his failure to call another matter when it became apparent that Assistant Public Defender Peter Fleury was occupied before Judge Means. Judge McBryde's incarceration of Peter Fleury for refusing to answer a question posed to him by Judge McBryde during the course of a routine, non-emergency hearing regarding the substitution of counsel can also be seen as an effort by Judge McBryde to control a proceeding before him by imposing a drastic sanction on Mr. Fleury in the hope that it would bring the proceeding to a quick close.

Judge McBryde's insistence that Mr. Satz be sentenced in his court before being sentenced in Arizona also fits into this pattern of inflexibility and control. Judge McBryde's harsh treatment of Nancy Doherty in the Torres matter is, in part, a by-product of his emphatic assertion of control and a rebuke of Ms. Doherty for what Judge McBryde perceived as an attempt to circumvent his control.

Judge McBryde's barring of Matt Golla and his complaints to Ira Kirkendoll also bespeak his desire to control the workings of the Federal Public Defender's Office. Similarly, Judge McBryde's abusive treatment of AUSA John Teakell over the failed teleconference can be seen as another effort to assert control over the operations of the U.S. Attorney's Office.

4. Inappropriate Conduct Toward Fellow Judges

The final pattern noticed by the Special Committee is Judge McBryde's apparent disregard and lack of respect for his fellow judges. A federal judge should strive to foster collegiality and cooperation with his or her fellow judges, whether they be within the same district, outside the district or in the state system. To the contrary, Judge McBryde's conduct has at times fostered just the opposite. He did not a return an important telephone call placed to him by Judge Lowe about a scheduling matter. Then he instructed his clerk to tell Judge Lowe that he was not welcome in chambers. After having treated Judge Lowe so disrespectfully, he never called him to explain or apologize, despite Judge Lowe's invitation for him to do so. Similarly, Judge McBryde demonstrated utter disregard for

Judge Rosenblatt in his handling of the Satz matter by (i) refusing to call him to find out the true nature of Judge Rosenblatt's sealing order and (ii) characterizing (in open court and on a public record) Judge Rosenblatt's actions in parallel proceedings in Arizona as an effort at "manipulation." As with Judge Lowe, Judge McBryde never extended Judge Rosenblatt the basic courtesy of calling him to discuss these matters prior to levying his criticisms.

Equally, if not more, deplorable is Judge McBryde's treatment of Judge Mahon. Judge McBryde succeeded Judge Mahon on the bench, and Judge Mahon desperately wanted him to succeed. Yet, Judge McBryde accused Judge Mahon of not supporting him enough and recently called him "despicable" in the presence of other judges.

Judge McBryde's relations with Judge Sanders appear to be strained as well and his relationship with Judge Means is openly hostile.

Judge McBryde has offered some explanations for the status of his relationships with, and treatment of, each of the judges mentioned above. His explanations help the Special Committee to some extent in its understanding of specific negative episodes involving other judges, but they do not justify his treatment of his fellow judges in the Special Committee's mind, nor do they shed any light on this inexplicable pattern of inappropriate conduct toward his colleagues on the bench.

5. Effect on Legal Community

Perhaps the Committee's greatest concern (and the most troubling testimony presented) is the pervasive and chilling impact Judge McBryde's treatment of people has had on the Fort Worth legal community. Judge McBryde has engendered a genuine sense of fear in a startlingly broad spectrum of the Fort Worth bar. In the trial practices section above (Part III.B), we discussed specific instances in which intimidation by Judge McBryde and fear of him caused competent, well-regarded lawyers to fail to take positions they otherwise would have or caused them to become flustered and ineffective:

- Frank McCown, a former U.S. Attorney with forty-five years experience as a trial lawyer, spoke of being so

jarred by Judge McBryde's treatment of him during the Mizell trial that he was bordering on being ineffective;

- Dominic Gianna, also an accomplished trial attorney, relayed to the Committee that fear of Judge McBryde caused him to fail to make a motion for a directed verdict at the proper time and to fail to develop certain testimony he thought important because he was fearful of Judge McBryde;
- Paul Gartner, the Deputy Chief of the Criminal Division and an experienced AUSA, testified that he did not take certain positions he felt he should have in the Mizell case because he was intimidated by Judge McBryde;
- Mr. Stickney, the First Assistant Public Defender and an experienced trial lawyer, testified that the attorneys in the Public Defender's Office generally forgo asking questions during jury voir dire out of the fear that Judge McBryde will embarrass them in front of the jury panel, leaving a negative first impression of them or their client in the jurors' minds;
- Michael Heiskell, a distinguished criminal defense lawyer and former AUSA, testified that his lawyering during the Burgos trial was altered because of Judge McBryde's demeanor and Mr. Heiskell's concern about upsetting him; and
- Warren St. John, who testified for Judge McBryde, conceded that during the Cushman case Judge McBryde's rules and restrictions were chilling on the lawyers and that his colleagues do not want to appear before Judge McBryde.

The Committee also heard testimony from supervisors in both the U.S. Attorney's Office and the Federal Public Defender's Office about the broader effect Judge McBryde has had on the attorneys in those offices. Marc Barta, an Executive Assistant United States Attorney in charge of the day-to-day operations of the entire Fort Worth office of the United States Attorney, testified about a tangible way in which the sense of fear engendered by Judge McBryde has manifested itself in the Civil Division of the U.S. Attorney's Office:

> "There has evolved a practice that any document, no matter how routine or normal or how many times it may have been filed in the same substance before, when it is going to be filed in Judge McBryde's court, every Assistant, no matter what their level of experience — and we have no one in that section with less that 10 years of litigation experience — that every motion of any kind is taken to [Mattie Compton, the Deputy Chief of the Civil Division] for a review.
>
> It's not a review, necessarily — although sometimes a component of it is; whether or not this is the best response that can be made or the best position cases have been cited (sic). It is basically a review. 'Is there anything in here that he can get me for? Can I get in trouble? Is he going to somehow be mad at me or sanction me for filing this particular pleading?'" (Barta, TR: 1260.)

This practice was instituted by the rank and file in the office as a form of self-protection. Mr. Barta also testified that it is "an absolutely continuing struggle in every case that [the office has] to make sure the settlement offers [the attorneys] make are influenced only by [their] best litigation judgment and not by some fear of personal reprisal for what may or may not happen." (Barta, TR: 1257-58.) Mr. Barta also described the immediate reaction of genuine concern a simple phone call from Judge McBryde's chambers to any attorney in the office causes throughout the office and his belief that, as a result of the Dawson case, Assistant U.S. Attorney Wayne Hughes became a less effective attorney because of the fear engendered in him by Judge McBryde. Finally, Mr. Barta testified that no AUSA from Dallas is willing to come to Fort Worth to fill a long-standing vacancy there.

Paul Gartner, the Deputy Chief of the Criminal Division, testified similarly. According to Mr. Gartner, John Teakell whom Judge McBryde had found in contempt in the telephone conference incident was petrified about having to appear before Judge McBryde after having testified in these hearings. His fear was so great that he asked Mr. Gartner to transfer him off a case set to go to trial in front of Judge McBryde, even though he was the assistant in the office most knowledgeable about the case.

Mr. Gartner also told the Committee about a conversation he had with retired AUSA Claude Brown who was the AUSA (along with Wayne Hughes) involved in the Dawson case:

> "I was talking to Mr. Brown a few days before this Committee first convened in New Orleans and Mr. Brown was indicating hesitancy to appear in New Orleans. I said, 'Well, Claude, that's your decision, but you're retired now. That's your decision. You are going to have to make that decision.' He expressed to me, 'Paul, I'm afraid that I would get appointed on some case and then end up back in Judge McBryde's court.'" (Gartner, TR: 1336-37.)

Mr. Kirkendoll's and Mr. Stickney's descriptions of the effect on the Federal Public Defender's Office are strikingly parallel. They both described the high stress level under which their attorneys function when involved in a case before Judge McBryde. According to Mr. Kirkendoll: "I had had complaints that people were burning out — and I could see that — because of the demand and the difficulties and the personal attacks that were occurring on them in Judge McBryde's courtroom." (Kirkendoll, TR: 862.) Mr. Kirkendoll also described that his attorneys do not sleep well on nights before routine docket calls in Judge McBryde's court. As supervisors, Mr. Kirkendoll and Mr. Stickney attempted to devise a rotation system through which they would alleviate some of the stress on attorneys who were frequently appearing before Judge McBryde by allowing those attorneys to take some Dallas cases and asking the Dallas attorneys to take some cases in front of Judge McBryde. That system proved too difficult to implement after Mr. Stickney was transferred to the Fort Worth office in the wake of Judge McBryde's barring of Matt Golla from his court and because the attorneys in Dallas were reluctant to take cases before Judge McBryde.

The morale in both the U.S. Attorney's and Federal Public Defender's Offices has, not surprisingly, been negatively affected by Judge McBryde's treatment of the attorneys in those offices. The testimony of Messrs. Barta, Gartner, Kirkendoll and Stickney, not to mention Teakell, Sanders, Henry, Fleury and Golla, attests to the negative impact Judge McBryde's conduct has had on office and individual morale. Indeed,

Messrs. Sanders, Henry, and Brown decided in part because of Judge McBryde to leave jobs they enjoyed.

Judge McBryde's negative effect on the Fort Worth legal community goes beyond the U.S. Attorney's and Federal Public Defender's Offices. Nancy Doherty's testimony evidences the impact on the Clerk's Office for the Northern District of Texas. In addition, the Committee heard testimony from Judge Eldon Mahon, Judge Barefoot Sanders and Judge Terry Means that they received numerous complaints from a wide array of lawyers about Judge McBryde's conduct on the bench. Michael Heiskell testified that he generally charges clients a 15 percent to 20 percent higher fee to represent to them, if the case is before Judge McBryde. Committee Exhibit C-98, the Tarrant County Bar Association Judicial Evaluation Survey for 1993, is consistent with this pervasive feeling in the Fort Worth legal community that Judge McBryde does not treat attorneys well. Seventy-eight percent of those who responded answered "no" to the question of whether Judge McBryde demonstrates proper judicial temperament. Ninety-four percent or more of those who responded answered "yes" with respect to the same question for the other three district court judges.

The Committee is extremely concerned about the negative and chilling impact Judge McBryde's behavior has had on the legal community of Fort Worth. In addition to the evidence adduced at the hearings, the reluctance of witnesses to come forward and to testify in these proceedings because they feared reprisal from Judge McBryde underscores the sense of fear Judge McBryde has caused throughout the Fort Worth legal community. Although Judge McBryde did present witnesses who testified that they are not intimidated by him, the evidence is unmistakably clear that Judge McBryde has engendered a sense of fear and dread in a significant portion of the Fort Worth legal community. Needless to say, this brings disrepute on the entire federal judiciary and negatively impacts the effective administration of justice within the Northern District of Texas.

The Committee believes that the Council has the unique responsibility to address this pervasive negative impact not merely because it brings disrepute on the judiciary and adversely affects the effective and expeditious administration of

justice and business of the courts within the Fifth Circuit, but also because no other effective remedy may exist. The very nature of the effect of Judge McBryde's pattern of conduct — the failure of lawyers to act; the decision to forgo asking questions or moving for relief; the sleepless nights; the refusal to accept cases; the decision to seek employment elsewhere; the compromising of advocacy as a form of self-protection — cannot be remedied through the appellate process and often cannot even be articulated in isolation. Nevertheless, the harm to administration of justice is palpable and must be redressed.

Needless to say, these patterns are extremely troubling to the Special Committee and unfortunately suggest the likelihood of continuation.

## V. DR. OSOFSKY'S REPORT

The Special Committee retained as its consultant Dr. Howard J. Osofsky, M.D., Ph.D., Professor and Chair of the Department of Psychiatry at the Louisiana State University School of Medicine in New Orleans, to be present at the hearings. Dr. Osofsky then attended the closed hearings in New Orleans from August 25 to August 29, 1997, and in Fort Worth, Texas, from September 29 to October 2, 1997. Dr. Osofsky heard the testimony of the fifty-five witnesses who testified, along with the testimony of Judge McBryde.

On November 4, 1997 Dr. Osofsky tendered his report to the Special Committee. This report, and his response to a supplementary question posed by the Special Committee, are in Attachment A. This report summarized his impressions after observing Judge McBryde and the various witnesses during the hearings from August 25, 1997 to August 29, 1997, in New Orleans and from September 29, 1997 to October 2, 1997, in Fort Worth.

We remind the Judicial Council of the reasons underlying and the confined objective of Dr. Osofsky's participation in this proceeding, set forth in Part II of this Report. Dr. Osofsky was careful to explain that it is neither possible nor ethical for him to make a professional psychiatric diagnosis from observations at the hearings and accordingly has made no such diagnosis and has reached no conclusion as to whether Judge McBryde does or does not have a psychiatric problem. He did respond to the

third option, writing that based on his observations there "is cause for some concern" that "[o]nly a thorough medical and psychiatric evaluation can substantiate or rule out."

Dr. Osofsky briefly explained the reasons underlying his conclusion. Based on his attendance during the nine days of hearings, he observed that Judge McBryde has apparently made a number of decisions which could be perceived as rooted in arbitrariness, suspiciousness, anger, arrogance, and contempt. Especially with respect to the attorneys who appear before him, Judge McBryde does not seem to fully consider the impact of his decisions upon their self-esteem and their careers. The instances of concern have occurred repeatedly over a period of years, with Judge McBryde showing little sense, even with his growing experience, of reflective reconsideration about his behavior and decisions. Dr. Osofsky explained his growing concerns as the hearing went on about Judge McBryde's being arbitrary, distrustful, and suspicious of fellow Judges and lawyers. Judge McBryde repeatedly has conveyed his belief that others wish to deceive him, with Dr. Osofsky citing Judge McBryde's conviction that both the Public Defenders and Assistant United States Attorneys are not being fully candid with him. The offense of disobeying or appearing discourteous to the court has seemed to outweigh all other considerations. Dr. Osofsky noted the apparent arbitrary punishment of the entire Public Defenders' Office for a mistake by one attorney in that office, which was justified by Judge McBryde as educational. Dr. Osofsky explained that that testimony and Judge McBryde's own statements indicate an apparent arrogance, an expectation of special treatment, and some lack of sensitivity to the concerns of others.

Dr. Osofsky observed that a number of the behaviors and reactions described during the hearings are consistent with those commonly observed in individuals suffering from psychiatrically defined Paranoid and Narcissistic Personality Disorders, but that such behavior and reactions are also consistent with a variety of medical problems.

The Special Committee asked Dr. Osofsky to supplement his report by responding to the hypothetical question of assessing the prospects for treatment if further evaluation established

that Judge McBryde is suffering from Paranoid and Narcissistic Personality Disorder.

Based on his observations during the nine days of hearings and his examination of the record presented during the hearings, Dr. Osofsky responded on November 17, 1997 that if, after adequate evaluation, Judge McBryde is indeed definitively diagnosed with Paranoid or Narcissistic Personality Disorder, many factors learned during the course of the evaluation would help in determining treatment and likelihood for the success of that treatment. In light of his observations during the hearing, Dr. Osofsky cautioned, however, that important factors in determining prognosis would be the patient's recognition, appreciation and acknowledgment of the circumstances and his willingness to participate in the treatment. In conclusion, Dr. Osofsky stated that "without such appreciation and willingness to participate in treatment the prognosis is very guarded."

In accordance with adopted procedure, the Special Committee set a date for Judge McBryde's counsel to cross-examine Dr. Osofsky about the reports and bases therefor. Counsel for Judge McBryde wrote to Counsel for the Special Committee that he declined to question Dr. Osofsky prior to issuance of this Report, citing, inter alia, lack of detail in his report and the demands of Judge McBryde's schedule.

## VI. CONCLUSION AND RECOMMENDATIONS

The task of the Judicial Council is to determine whether Judge McBryde should be certified as disabled pursuant to 28 U.S.C. § 372(b) and whether Judge McBryde "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c)(1). Before we set forth the recommendations and general rationales therefor, the Judicial Council should be aware of the general legal objections that Judge McBryde has raised throughout this proceeding, and the positions of the Special Committee, after extensive research and consideration, with respect thereto.

### A. General Legal Positions

Judge McBryde has raised constitutional objections to this, and indeed any, Section 372(c) proceeding, largely based upon the assertions that it is a violation of the separation of powers and it is a violation on the principle of judicial independence

underlying Article III. In effect, the argument reduces to the position that only Congress can "sanction" a federal judge, and then only by removal from office by use of the Impeachment Clause. It is an understatement to say that the Special Committee, composed of Article III judges even if not sitting in a judicial capacity, is mindful of the principles and values articulated with respect to separation of powers and judicial independence. But we are also mindful of the fact that the process in which the Judicial Council is engaged is not a recent creation of Congress. The genesis of the concept of Judicial Councils was suggested to Congress by the Judicial Branch almost 60 years ago; the 1980 Act and the 1990 amendments thereto were a product of cooperation, input, and agreement by the Legislative and Judicial Branches;[49] and the Judicial Branch had been involved in a more limited form of inquiry of Article III judges for almost 200 years.[50] Some form of "accountability" of Article III judges short of removal from office, and some forum for so determining short of impeachment proceedings in Article I institutions, are permissible. Indeed, the fact that Congress permitted the Judicial Branch to be the forum is far less threatening to either the principle of separation of powers or the principle and values of judicial independence of Article III judges than if such inquiries were performed by another Branch. The Special Committee, like Article III courts which

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[49] Judicial Councils for each Circuit were originally created in 1939 at the urging of Chief Justice Hughes and other prominent federal judges. See, generally, Chandler v. Judicial Council, 398 U.S. 74, 85 (1970); see also, id., at 96-98 (Harlan, J., concurring). The Judicial Council's Reform and Judicial Conduct and Disability Act of 1980 was also the product of "consensus and compromise" both among the three branches and between the two Houses of Congress. See, generally, H.R. Rep. No. 101-512, 101st. Cong., 2d Sess. 10 (1990). The Judicial Conference of the United States courts drafted a model bill that became the basis for the version of the legislation adopted by the House. When this House bill was ultimately reconciled with a separate Senate version in conference, the key principles and provisions of the judicial conference model were retained. See, id., at 10.

[50] See note 55, infra.

have addressed these issues,[51] believes Section 372(c) proceedings are constitutional.

The second legal argument advanced by Judge McBryde is that the investigation and hearing in this proceeding involve the "merits" of his actions as an Article III judge, and that Section 372(c) and principles of appellate review preclude the Judicial Council from acting upon the matters that are the subject of the Findings of Fact. Judge McBryde relies upon Section 372(c)(3)(A)(ii), which provides that, upon receiving a complaint, a Chief Judge "may" dismiss a complaint of judicial misconduct if the Chief Judge concludes that the complaint is "directly related to the merits of a decision or procedural ruling."[52]

In accomplishing its task, the Special Committee was evermindful that Section 372(c) is not an alternate avenue for appeal of matters directly related to the merits of any particular decision. But the focus of this Section 372(c) proceeding is directed at the conduct and the mental health of a judge. Neither we nor the Council would utilize Section 372(c) to investigate a judge because a jury charge given or a summary judgment decision rendered by a judge was "wrong" or "incorrect."

But just because Section 372(c) is not a substitute for appeal, it does not follow that any act of a judge that even might conceivably be the subject of an appeal is therefore by definition outside the permissible scope of and immune from investigation in a Section 372 proceeding. In reviewing the conduct and actions of any judge in a Section 372 proceeding, we recognize

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[51] Hastings v. Judicial Council, 829 F.2d 91 (D.C. Cir. 1987); In re Certain Complaints, 783 F.2d 1488 (11th Cir. 1986).

[52] Section 372(c)(3) provides in relevant part:

> (3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may —
>
> (A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous.

there is a continuum. Exactly where in that continuum stands the "merits" line over which a Judicial Council or Special Committee may not cross is in most instances fact specific.[53]

We will make some observations. There seems to be less danger of even approaching let alone crossing that line when the subject matter of the Section 372 proceeding relates to a complaint by a party to a case that is "final" in a legal sense. The parties have received their judgment, and the appellate courts have made rulings. Similarly, there is less danger of approaching or crossing the line when the subject matter of the Section 372(c) proceeding is a complaint involving the conduct, actions, or demeanor of a judge. There is less danger when the subject matter of a Section 372(c) proceeding involves a pattern of a judge's conduct and behavior in a number of cases over time, which pattern by its very nature cannot be reviewed on appeal of a case. Indeed, it has been noted that a judicial council may not "pass upon allegations relative to a judge's disposition of a particular piece of litigation, absent any . . . corruption or other impropriety or any indication of a broader pattern of conduct evidencing incapacity, arbitrariness, or neglect of office." In re Charge of Judicial Misconduct, 593 F.2d 879, 881 (9th Cir. 1979) (emphasis added) (quoted in In re McBryde, 117 F.3d at 230).

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[53] We observe that the statute itself is not prohibitory ("shall dismiss a complaint") but permissive ("may dismiss a complaint"), and even then the statute carefully uses the adverb "directly" as a qualifier of the phrase "related to the merits." We believe this language evinces the recognition that judgment and discretion based on the particular circumstances control, and even then the "merits" can be indirectly approached in a Section 372(c) proceeding. Moreover, we note that the statute refers only to the "merits" of a "decision" or a "procedural ruling." Rules of statutory construction would suggest that Congress intended to cover two distinct classes of actions, which may not comprehend the entire range of actions in which a federal judge engages.

This is no reason to address further such issues. We raise them only to suggest that the form and the actual language of Section 372(c)(3) upon which Judge McBryde relies is far narrower and less precise than his argument suggests.

In advancing his argument concerning the impropriety of the Special Committee and the Judicial Council becoming involved in the "merits" of his actions, Judge McBryde has never purported to draw any line. Rather, his argument reduces, in essence, to the proposition that anything that a judge does in his courtroom or in his capacity as a judge involves the "merits" of something and cannot be scrutinized except on direct appeal, regardless of the manner in which it is done, the persons to whom it is done, the extra-legal consequences of those actions, or the pattern of such conduct that may be disclosed. We reject that position. We observe that the Judicial Conference and other Judicial Councils have upheld or made findings of misconduct in factual contexts that, under the arguments Judge McBryde has previously advanced, would impermissibly involve the "merits" of the judge's actions.[54]

In the view of the Special Committee, the Findings of Fact contained in this Report do not cross any impermissible line

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[54] See, e.g., In re Petition No. 88-372-001 (U.S. Judicial Conference, Dec. 27, 1988) (reprimanding judge for "gratuitous statement" and "intemperate criticism" of complainant in course of court proceeding: "a judge may become so intemperate and inconsiderate as to warrant some reprimand from his fellow judges"); Phelps v. Kelly, Committee Memorandum and Order No. 87-372-001, at 7-8 (1987) (reprimanding judge for criticizing attorney in the course of a proceeding "in terms which were injudicious, intemperate and demeaning" of the attorney); In re Charge of Judicial Misconduct, Nos. 93-80015, 93-80288 (9th Cir. Judicial Council, August 20, 1994) (taking "appropriate disciplinary action" based upon judge's "intemperate and abusive remarks from the bench"); In re Judicial Complaint (11th Cir. Judicial Council, Oct. 8, 1990) (reprimanding as conduct prejudicial to the administration of justice a magistrate's decision to order the arrest of attorney who failed to appear in court because of a conflicting criminal trial); In re Judicial Complaint No. 82 (1st Cir. Judicial Council, July 18, 1989) (concluding that judge engaged in conduct "prejudicial to the administration of justice" by issuing an opinion which barred an attorney from practicing in his court; rule against review of "merits" of judicial decisions "does not license or insure statements having only a tenuous and wholly unnecessary connection with the disposition of the proceeding but, at the same time, the appearance if not the actuality of judicial conduct plainly in violation of applicable ethical standards").

involving review of matters "directly related to the merits" of Judge McBryde's "decisions" or "procedural rulings."

Finally, Judge McBryde has raised numerous objections to the efforts by the Special Committee to ascertain whether he may be suffering a mental disability. This objection will become moot if the Judicial Council adopts the recommendation of the Special Committee. We will briefly summarize why Judge McBryde's arguments were considered by the Special Committee to be without merit.

Pointing to the language of Section 372(b), Judge McBryde argued that before there could be any investigation as to whether he had a mental disability, there first had to be a conclusion that he was unable to carry out the duties of a district judge. We rejected that contention because nothing on the face of the statute requires such a procedure. Judge McBryde then argued that it is inappropriate for the Judicial Council to order, or to be involved in the process of deciding whether to order, an examination. The Special Committee rejected that position. The statute, Section 372(c)(1), provides on its face that the Judicial Council, through a Special Committee, can make such an investigation, even if the Judicial Council is precluded from taking action unless the standard of Section 372(b) is met. Not only does the statute on its face authorize a Special Committee to do so, there is a long tradition of federal judges undertaking these types of inquiries of Article III judges.[55] Given the present

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[55] In 1801, legislation provided that upon "satisfactory evidence" of "the inability of the district judge . . . to perform the duties of his office," the "circuit court" "shall" direct a circuit court judge to perform the district judge's duties "for and during the period the inability of the district judge shall continue." Act of Feb. 13, 1801, ch.4, § 25, 2 Stat. 89, 97. In 1809, Congress created a system wherein the federal marshal or district attorney could submit evidence of a district judge's disability to the appropriate Supreme Court justice; if the district judge was determined disabled, he was relieved of duties for the period of disability. Act of March 2, 1809, ch. 27, 2 Stat. 534. In 1850, Congress enacted legislation which remained in place for almost 70 years, providing for certification of the disability of a district judge by the clerk of the court to the circuit judge and the designation by the circuit judge of substitutes during the period of disability. Act of July 29, 1850, ch. 30, 9 Stat. 442. In 1919, Congress altered the system for dealing

statute, the long tradition of the involvement of the federal judiciary in such inquiries, and the authority of the Judicial Council under Section 332(d) to enter any order necessary and appropriate, we determined that the Council could enter an order requiring a federal judge to undergo an examination, so that the Council could have the benefit of professional expertise to augment its evaluation.

B. Recommendations

1. Should There Be an Order To Undergo an Examination

The Special Committee has given careful thought to whether it should recommend to the Council an order requiring Judge McBryde to undergo a psychiatric examination. After observing Judge McBryde and reading a number of records of trials over which he presided and hearing his testimony, it is clear to the Special Committee that Judge McBryde is focused on his judicial duties and performs certain of the duties of his office efficiently. Notwithstanding these observations, our concerns and the factual bases for these concerns are set forth in this Report.

One reason to order an examination — improvement of Judge McBryde's condition by treatment — finds little encouragement from Dr. Osofsky that treatment would benefit Judge McBryde. Judge McBryde is extremely hostile to any suggestion that he is suffering under any mental disability. He has repeatedly made it clear that he will resist to the utmost any suggestion that he should visit a psychiatrist or obtain treatment. Dr. Osofsky's report in this respect — which is based upon his observations during the nine days of hearings — states that Dr. Osofsky cannot predict the result of any treatment program. But

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with judicial disability and enacted legislation which authorized the President to certify that a federal judge was disabled and to appoint (with the advice and consent of the Senate) a new judge. Act of Feb. 25, 1919, ch. 29, sec. 6, § 260, 40 Stat. 1156, 1158. The current Section 372(b) of Title 28, enacted in 1957 (and not substantively modified since then), authorizes the President, upon the certification of a majority of a judicial council that a judge is permanently mentally or physically disabled, to appoint (with Senate confirmation) a new judge.

the report points out that, absent cooperation, the prognosis is guarded. We surmise that under the best of circumstances treatment for Paranoid and Narcissistic Personality Disorders (if indeed an evaluation established that Judge McBryde has this condition) is problematic. Common sense tells us that if Judge McBryde persists in refusing to recognize that he has a problem and resists treatment we have little chance that any treatment would be beneficial.

Dr. Osofsky emphasized in his report that any diagnosis would require a psychiatric history, a developmental history, family and social information, medical information, and a history of medications. Obtaining this type of highly personal information from a resistant individual seems inherently difficult to accomplish by means of a court order. We understand that, in a situation where the individual refuses to cooperate, the diagnostic process is itself more difficult and uncertain, to say nothing of the prospect for effective treatment.

The Special Committee firmly believes that requiring an Article III judge to submit to a psychiatric evaluation against his will is an extreme step and should be taken most reluctantly. So our conclusion that it is unlikely that we will derive concrete benefit from such an examination argues strongly against pursuing this feature of the investigation. Additionally, while the Special Committee feels that it has pursued the investigation as expeditiously as possible, satellite litigation has caused inordinate delays in the completion of our work. If we pursue this aspect of the investigation and require Judge McBryde to undergo a psychiatric examination, we can anticipate further delays and, given the coercive aspect of an examination, diminished prospects of a beneficial medical result.

In all the circumstances — Judge McBryde's refusal to cooperate, the guarded prognosis for treatment and difficulties of diagnosis associated with this refusal, and the need for closure in this proceeding — we have concluded that pursuing a forced psychiatric examination now would not be the most constructive and effective remedy for the problems we have identified.

2. Section 372(c): Conduct Prejudicial to the Effective Administration of the Courts

With respect to whether Judge McBryde has engaged in conduct prejudicial to the effective administration of the business of the courts, the Special Committee has determined that he has done so in numerous respects. As set forth in the Findings of Fact, many of these individual instances, together with the patterns demonstrated over the years surveyed, require these conclusions. Without purporting to assign relative importance, the Special Committee generally points to the following matters: the Fourth Floor Order; Judge McBryde's unfounded suspicions over the veracity of the attorneys; Judge McBryde's treatment of court personnel such as Nancy Doherty; Judge McBryde's humiliating treatment of attorneys and fellow judges, particularly Judge Lowe and Judge Mahon; Judge McBryde's imposition of draconian sanctions for minor transgressions; and Judge McBryde's overly strict adherence to rules at trial which prevented attorneys from effectively representing their clients.

The Special Committee finds that Judge McBryde has engaged for a number of years in a pattern of abusive behavior, which has brought disrepute upon the federal judiciary. Moreover, much of Judge McBryde's conduct is inconsistent with Canon 3(A)(3) of the Code of Conducts for United States Judges, which provides: "A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." Based on the foregoing, the Special Committee concludes that Judge McBryde has engaged in conduct which is "prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c). Judge McBryde's conduct is unacceptable and sanctionable under 28 U.S.C. § 372(c)(6)(B).

Notwithstanding our conclusion that further pursuit of an examination of Judge McBryde is not warranted, it is apparent to the Special Committee that Judge McBryde's tendencies to suspect the motives of others frequently impair his ability to evaluate good faith efforts on the part of lawyers and to fashion appropriate sanctions for perceived contemptuous conduct.

That impairment frequently adversely impacts on the ability of lawyers to properly represent their clients. Also, Judge McBryde's obsession with controlling the minutest details of trials impedes the lawyers' ability to develop and present their cases.

These conclusions persuade us that we should request that Judge McBryde voluntarily retire with full benefits in accordance with the provisions of 28 U.S.C. § 372(c)(6)(B)(iii), including waiver of the ten-year requirement. If the request is accepted by Judge McBryde, he can avoid sanctions by the Judicial Council and retire with the measure of dignity appropriate for the circumstances.

**RECOMMENDATION NO. 1**

**The Special Committee recommends that before imposition of sanctions, the Fifth Circuit Judicial Council request, pursuant to 28 U.S.C. § 372(c)(6)(B)(iii), Judge McBryde to retire voluntarily with the provision that the Judicial Council shall recommend that the length of service requirements under 28 U.S.C. § 371 shall not apply. The Special Committee recommends that Judge McBryde must accept the Judicial Council's request by January 5, 1998.**

In the event Judge McBryde declines an invitation to retire, then the matter of sanctions must be addressed. Judge McBryde, under these circumstances, must be evaluated as an individual who is responsible for his conduct, and his conduct is found by the Special Committee to be unacceptable as he has engaged in a course of conduct that amounts to a pattern of abusive treatment of those who appear before him and his fellow judges. Such conduct has brought disrepute upon the judiciary and has been prejudicial to the effective administration of the business of the courts.

**RECOMMENDATION NO. 2**

**A. A public reprimand of Judge McBryde, as authorized by Section 372(c)(6)(B)(b)(i).** The Special Committee recommends that appended to the public reprimand shall be a copy of this report, with the proviso that if the Judicial Council agrees with the recommendation of the Special Committee concerning the mental health issue, those portions of the report relating thereto (including so much of the background, the

discussion of Dr. Osofsky and his reports, and this section) be excised from the copy appended to the reprimand.

**B. Ordering that no new cases be assigned to Judge McBryde for a period of one (1) year.** The Judicial Council is specifically authorized by Section 372(c)(6)(B)(iv) to order that, on a temporary basis for a time certain, no new cases be assigned, as a sanction in a Section 372(c) proceeding. The Special Committee believes that no new assignments for this limited period is necessary and appropriate in view of the seriousness of the abuses we have found to have existed over a number of years; the fact that this abuse has run the gamut of cases over which he has presided; and the need for the federal courts to be seen to be concerned over, and to attempt to remedy, abuses that are found to exist in the Article III courts. Moreover, the Special Committee was struck that during the weeks of testimony, as incident after incident was recounted, by witness after witness who related the fear and distress generated by his conduct and actions, Judge McBryde evinced no reflection or remorse concerning the totality of his conduct. In the first days of the hearings, his counsel seemed to suggest that the incidents identified by the Committee were early in his tenure, thereby implying that he had moderated his behavior in later years. But as the evidence showed these patterns persisting to the present, even such indirect, tacit suggestion that he accepted responsibility disappeared. Aside from one or two instances (regrets for the initial Saulsberry sanction and for calling Judge Mahon "despicable"), Judge McBryde refused to acknowledge the impropriety of his actions. His repeated responses that his actions were proper and appropriate bespeak both of denial and the probability that, absent self-reappraisal, such conduct will not abate.

Depriving Judge McBryde of new assignments for this period will not prevent continued abuse, but it will provide him some opportunity for deep reflection, which is necessary and desirable. Moreover, as we have detailed, personnel within the court system, including staff such as Nancy Doherty and fellow judges, have been seriously abused. These interests, together with the interests of those institutional participants in the criminal justice system in Fort Worth, deserve to perceive that

tangible efforts will be made to discipline a judge for his abuse in an effective and highly visible fashion.

**C. The entry of an order directing that Judge McBryde for a period of 3 years not participate in all cases pending (i) as of the date of the entry of such order and in which the attorneys listed below are currently involved and (ii) in all cases filed after the entry of such order in which the initial notice of appearance includes the attorneys listed below.**[56] Under Section 372(c)(6)(B)(vii), the Judicial Council is authorized to impose any order on a judge that is necessary and appropriate in light of the factual circumstances. We believe that this order is warranted, if not compelled, by the factual circumstances. As we noted earlier in this Report, the Counsel for the Special Committee encountered reticence, if not reluctance, from persons who had experiences before Judge McBryde even to discuss incidents that were matters of record, let alone appear before the Special Committee. We believe that such reticence and reluctance was based upon a well-grounded apprehension that Judge McBryde might retaliate against those persons who testified.

In the course of this Report, we have set forth examples of conduct by Judge McBryde which, in our view, could reasonably be called retaliatory, including his behavior in the Torres matter (toward Ms. Doherty), in Dawson and Anderson (toward the AUSAs involved), in the Fourth Floor Order and the suggestion that Public Defender Matt Golla never again appear in his court, and in the Woods matter. As noted above, AUSAs Barta and Gartner testified that AUSAs Brown and Teakell fear that Judge McBryde may seek some sort of retribution against them for testifying in the present proceeding.[57] A stark example

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[56]Most of the attorneys listed below were subpoenaed and testified against Judge McBryde during the course of the evidentiary hearings. A few, although ultimately not called by Special Counsel to testify, were listed by Special Counsel as potential Committee witnesses (or were involved in events described) in notices provided to Judge McBryde prior to the hearings.

[57] As noted, while AUSA Gartner acknowledged that former AUSA Brown's concerns may be unfounded, they still illustrate the depth of fear caused by Judge McBryde's action in the Dawson matter.

of at least the perception that Judge McBryde would retaliate against lawyers is shown by the action of Judge Lowe of the Texas state court, who left his bench to come over to the federal court to explain personally to Judge McBryde the circumstances facing Mr. Gray.

Furthermore, less that three weeks ago, one of Judge McBryde's counsel filed a post-hearing motion directed at the submission of one person, terming it "illegal" and "unethical" and a violation of Judge McBryde's "rights" and "privacy." This motion was also served personally on that person. The Special Committee denied the motion without prejudice, but we were sufficiently concerned with the content and circumstances to observe that a person might conclude that an attempt to harass or retaliate against a witness in a federal evidentiary hearing may have occurred.[58] This direct experience with Judge McBryde's reaction to a witness who testified in connection with this investigation further informs our judgment.

If there is a possibility, as here, of retaliation, it is obvious to us that such can be done in subtle ways, especially to attorneys who are conducting a jury trial. We note again, as we explained above, that during the hearings Judge McBryde displayed no remorse for or reflection on most of these incidents, maintaining in effect that his conduct was at all times appropriate. This position strongly suggests that individual applications that he not preside will not be received for consideration by him from a de novo perspective. Moreover, Judge McBryde may simply be less sensitive to these concerns. We note that, when United States v. Satz was remanded to him, the panel suggested he consider the possibility that he recuse himself from further contempt proceedings against AUSA Cerow and Postal Inspec-

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[58] The post-hearing motion was directed at Dr. Osofsky and the report he issued based on his observations during the course of the evidentiary hearings. That report, described in Section V above, did not offer any diagnosis of Judge McBryde, but concluded that there "is cause for some concern" that "[o]nly a thorough medical and psychiatric evaluation can substantiate or rule out." The motion, including the characterizations set forth above and the demand that Dr. Osofsky retract his reports, clearly implied that legal action against Dr. Osofsky for assisting the Committee was contemplated.

tor Whiteaker. Judge McBryde, however, entered an order waiting until either of those parties made such a motion. Thereafter, however, Judge McBryde sat through these Section 372(c) hearings and heard Judge Rosenblatt testify that his sealing order was exactly as described by AUSA Cerow and that Judge Rosenblatt indeed did intend to preclude anybody, including Judge McBryde, from having access to that material. It would seem clear that Judge McBryde, who himself was a participant in a telephone conversation with Judge Rosenblatt as to which there is significant disagreement, cannot now preside in any other proceedings in this matter. Judge McBryde knows, through these proceedings, of Judge Rosenblatt's testimony; but AUSA Cerow and Postal Inspector Whiteaker are not aware either of that testimony or of Judge McBryde's knowledge thereof, because of the confidentiality of this proceeding. Nevertheless, Judge McBryde still has the contempt proceeding pending before him. We do not purport to recommend that the Judicial Council can or should do anything in United States v. Satz. We do believe, however, that Judge McBryde's recent behavior therein substantially supports the need and justification for this form of relief.

In sum, the Special Committee has the definite and firm conviction that the likelihood of retaliation by Judge McBryde over the short to intermediate time frame is substantial.

Finally, this order is required to protect the viability of the Section 372(c) process. The Special Committee requested testimony from a number of individuals who appeared before the Committee. In obtaining their testimony, the Committee was performing a task required by statute that is in the best interests of, among others, the federal judiciary. The Committee is entitled to obtain the truth. The persons listed have appeared or may appear on a regular basis in cases before Judge McBryde. By testifying in a manner adverse to a judge, these attorneys and their clients are at risk of potential retaliation. A witness in a Section 372(c) proceeding should not fear the prospect of telling the truth. In order to be able to obtain the truth to fulfill its obligations, the Judicial Council must be able to protect those who are asked to or required to provide evidence in those instances, which we hope are few, where

retaliation is likely. Having put these listed persons in potential jeopardy in its efforts to obtain the truth, the Council has the authority and the responsibility to take action to protect them.

Although certain of the individuals listed below come from the Public Defender and United States Attorney's Offices in Fort Worth, certain of the individuals are now in administrative positions, are leaving their current positions or rarely try cases before Judge McBryde (in particular Paul Stickney, Ira Kirkendoll, Matthew Golla and Marc Barta) and there are additional personnel in those offices. Others of the individuals are not now presently practicing in the Fort Worth area (Michael Sanders, Tim Henry, Dominic Gianna, and John Teakell) but conceivably could have occasion in the future to practice there. For these reasons, in the particular circumstances of this case, the Special Committee believes that this order is necessary and appropriate.[59] The individuals are:

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|---|---|---|
| Jay K. Gray | Matthew Golla | David Martin |
| Peter Fleury | Tim Henry | Frank McCown |
| Paul Stickney | Dominic Gianna | John Teakell |
| Arch McColl | Ira Kirkendoll | Michael Sanders |
| Richard Roper | Marc Barta | Paul Gartner |
| Michael Heiskell | Art Brender | Wayne Hughes |
| Claude Brown | Michael Snipes | Chris Milner |
| William Martin | Fred Schattman | |

[59] The Special Committee does not know the extent to which any of the listed persons have pending cases before Judge McBryde, have moved for recusal, the result thereof, and the status of pending appellate activity, if any. We do not suggest that this portion of the recommended order would or could displace any pending appeal.

Dated: December 4, 1997

Respectfully submitted,

Chief Judge Henry A. Politz
Judge W. Eugene Davis (Chairman)
Judge Robert M. Parker
Judge William H. Barbour, Jr.
Judge Edward C. Prado

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Department of Psychiatry

November 4, 1997

Gregory A. Nussell,
Circuit Executive, New Oleans, LA **Via FAX: 504/589-2722**

Henry A. Politz, Chief U.S. Circuit Judge, Shreveport, LA
W. Eugene Davis, U.S. Circuit Judge, Lafayette, LA
Robert M. Parker, U.S. Circuit Judge, Tyler, TX
William H. Barbour, Jr., District Judge, Jackson, MS
Edward C. Prado, District Judge, San Antonio, TX

Dear Mr. Nussell and Honorable Judges:

I am enclosing my report related to the hearing in the matters involving United States District Judge John H. McBryde. As I explain in the attached, these are my impressions and inferences as a consultant to the hearing panel from attending nine days of hearings in New Orleans and in Fort Worth.

Please feel free to contact me if you have -questions or wish me to provide anything additional.

Sincerely,

/s/
Howard J. Osofsky, M.D, Ph.D.
Professor and Chair

HJO:rc

Summary of my opinions related to the Hearing Before the Special Investigatory Committee

Date: October 20, 1997

To: Henry A. Politz, Chief U.S. Circuit Judge, Shreveport, LA
W. Eugene Davis, U.S. Circuit Judge, Lafayette, LA
Robert M. Parker, U.S. Circuit Judge, Tyler, TX
William H. Barbour, Jr., District Judge, Jackson, MS
Edward C. Prado, District Judge, San Antonio, TX

Re: Matters Involving United States District Judge John H. McBryde, Northern District of Texas, Under the Judicial Conduct and Disability Act of 1980

Prepared by: Howard J. Osofsky, M.D., Ph.D., Professor and Chair-Department of Psychiatry Louisiana State University Medical Center

This summary of my impressions and inferences as a consultant to the hearing panel results from attending nine days of hearings in the above referenced matter, from August 25, 1997 to August-29, 1997 in New Orleans and then from September 29, 1997 to October 2, 1997 in Fort Worth, Texas.

As I stated from the outset, it would be neither possible nor ethical for me to attempt to make a psychiatric diagnosis on the basis of such an observation. Indeed, I would emphasize that it is unethical and inconsistent with standards of practice to make a psychiatric diagnosis from mere observation. I have not examined Judge McBryde and a full examination would be necessary for me to arrive at any diagnosis. Further, I have not obtained a psychiatric history, developmental history, family and social information, medical information, and a history of medications; nor have I had access to any other evaluations that may have been carried out in the past. As per the initial agreement, I have also not received information that may have been gathered previously during the investigations leading up to these

hearings. Therefore, I have attempted to move along parallel with the actions unfolding during the hearings which I attended, utilizing my experience as a doctor - and especially as a psychiatrist -- in making observations and in thinking through the incidents and circumstances described. I have tried formulate my thoughts in a careful manner given the complexity and the gravity of the concerns. In advance' I am aware that some of the questions I will raise may not have relevance to the legal system. Other questions may be more relevant, and I am hopeful that they will be of use to the Special Investigatory Committee in their deliberations.

During my days of observation, I was impressed with many things that I would consider admirable about Judge McBryde. He clearly is an intelligent, focused, and dedicated individual. At all times he was keenly observant of the proceedings and involved with his attorneys. From my perspective, Judge McBryde came across as an imposing figure, with serious demeanor and generally controlled expressions, although there were occasions when he demonstrated anger, impatience, and somewhat sarcastic wit.

However, during the course of the hearings I became progressively concerned about a number of areas. Witnesses' testimonies as well as material entered as exhibits, indicate that Judge McBryde has apparently made a number of decisions which could be perceived as rooted in arbitrariness, suspiciousness, anger, arrogance, and contempt. There further emerged a sense that, in a number of his behaviors and decisions, he has been relatively unempathic to the effect of these behaviors and decisions on colleagues and lawyers appearing before him. Especially with lawyers, he has not appeared to take fully into account the impact of his decisions upoxi their self-esteem and even their careers. I found myself concerned about Judge McBryde's apparent failure either to consider other options or, after time for reflection, to reconsider his course of action. Certainly, I would not be surprised to learn that a particular judge in some isolated circumstance had overreacted, with his or her behavior impacting negatively upon decision-making at

that specific time. However, the instances to be considered by the Special Investigatory Committee have occurred repeatedly over a period of years. Furthermore, although Judge McBryde has described some situations where in retrospect he may have made different decisions given his growing experience, in general he has come across as feeling justified relative to most of the worrisome areas, showing little sense of reflective reconsideration about his behaviors and decisions.

Over the course of the hearings, I had growing concerns about Judge McBryde's being arbitrary, distrustful, and suspicious of colleagues and lawyers appearing before him. He has interpreted motives as malevolent when they have not appeared so intended. Repeatedly he has conveyed his belief that others wish to deceive him, convinced of both public defenders' and U.S. attorneys' not being fully candid with him. He has appeared overly concerned about loyalty and trustworthiness of associates, reacting with anger and attacks either to deviations on their part or to his perceptions of being devalued or insulted. The offense of disobeying or appearing discourteous to the court has seemed to outweigh all other considerations including those related to lawyers' realistic inability to comply with his orders, their trying to behave ethically and their wishing to represent their clients fully. Judge McBryde has justified as educational an apparently arbitrary punishment of the entire group of public defenders for a mistake of one attorney in that office. Even if unintentional on his part, testimony of colleagues, lawyers appearing before him, and his own statements indicate an apparent arrogance, an expectation of special treatment, and some lack of sensitivity to the concerns of others.

Finally, I must reiterate that this report is a summary of my impressions and inferences and that it would be inappropriate for me to make psychiatric diagnoses on the basis such an observation. However, witnesses' depictions of Judge McBryde, material entered as exhibits, and Judge McBryde's testimony, together provide a picture that is cause for some concern. A number of the behaviors and reactions described are consistent with those that are commonly observed in individuals suffering

from psychiatrically defined Paranoid and Narcissistic Personality Disorders. They are also consistent with a variety of medical problems -- side effects of medications, injuries, alcohol or other substance abuse, and neuropsychiatric conditions. Only a thorough medical and psychiatric evaluation can substantiate or rule out such conditions.

If there are additional questions or if I can be of further help, please let me know.

November 10, 1997

Howard J. Osofsky, M.D., Ph.D.
Professor and Chair
School of Medicine in New Orleans
1542 Tulane Avenue
New Orleans, LA 70112-2822

Dear Dr. Osofsky:

Re: Judge John M. McBryde

The Special Investigating Committee asks that you please supplement your report by answering the following question:

> If you assume that a thorough medical and psychiatric evaluation establishes that Judge McByrde is suffering from Paranoid and Narcissistic Personality Disorders, based upon what you have observed and learned from your participation in this matter, what are the prospects that such disorders can be successfully treated in Judge McBryde's case?

Sincerely,

/s/
W. Eugene Davis, Chairman
Special Investigating Committee

cc: Chief Judge Henry A. Politz
Judge Robert M. Parker
Judge William H. Barbour, Jr.
Judge Edward C. Prado
Mr. Gregory A. Nussel
Mr. Robert H. Fiske, Jr.
Mr. William H. Jeffress, Jr.

**SCHOOL OF**
**MEDICINE IN NEW ORLEANS**
Louisiana State University
Medical Center
1542 Tulane Avenue
New Orleans. LA 70112-2822
Telephone: (504) 568-6001
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Department of Psychiatry

November 17, 1997

VIA FAX. 504/589-2722

Mr. Gregory A. Nussel
Circuit Executive
United States Court of Appeals
600 Camp Street
New Orleans, LA 70130

Dear Mr. Nussel:

Attached is my response to Judge Davis's question (see his letter dated November 1O, 1997) in the matters involving U.S. District Judge John H. McBryde.

Please do not hesitate to contact me if you have questions or need anything farther.

Sincerely,

/s/
Howard J. Osofsky, M.D, Ph.D.
Professor and Chair

HJO:rc

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Department Of Psychiatry

November 17, 1997

W. Eugene Davis, Chairman
Special Investigating Committee
United States Court of Appeals
556 Jefferson Street, Suite 300
Lafayette, LA 70501

Re: Judge John M. McBryde

Dear Judge Davis:

In response to your letter of November 10, 1997, 1 would first emphasize that my answer to your question must remain somewhat hypothetical in that I have not carried out a psychiatric and medical evaluation of Judge McBryde, and therefore can neither attempt to make a diagnosis nor formulate prognostic outcomes. However, as I also noted, the behaviors that were described by witnesses as noted in exhibits and in examination and cross examination of Judge McBryde, are consistent wit h those that are commonly observed in persons suffering from psychiatrically defined Paranoid and Narcissistic Personality Disorders. If, after adequate evaluation, these diagnoses are ultimately made, they, by themselves, do not fully predict either the most desirable course of treatment or the ultimate outcome for a given individual. Many factors that would be elucidated during the course of a full evaluation would help in determining the treatment to be recommended and the likelihood for success of the prescribed treatment. However, it should be noted that an

important factor in determining the prognosis in a matter such as this would be the individual's recognition, appreciation, and acknowledgment of the circumstances that have led to the concerns of the Special Investigating Committee. An additional important factor in determining the prognosis in a case such as this would be the individual's willingness to participate in treatment. Without such appreciation and willingness to participate in treatment, the prognosis is very guarded.

Please do not hesitate to call me if you have questions or need additional information.

Sincerely,

/s/
Howard J. Osofsky, M.D, Ph.D.
Professor and Chair

HJO:rc

## APPENDIX F

United States Court of Appeals
for the District of Columbia Circuit

---

Filed February 1, 2002

No. 00-5016

THE HONORABLE JOHN H. MCBRYDE,
UNITED STATES DISTRICT JUDGE FOR THE
NORTHERN DISTRICT OF TEXAS,
APPELLANT,

v.

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND
DISABILITY ORDERS OF THE JUDICIAL CONFERENCE OF THE
UNITED STATES, ET AL.,
APPELLEES.

---

**BEFORE**: GINSBURG, *Chief Judge*, EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*.

**ORDER**

Appellant's petition for rehearing en banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

**ORDERED** that the petition be denied.

**Per Curiam**

*Circuit Judges* SENTELLE, ROGERS and TATEL would grant the petition for rehearing en banc.

A statement of *Circuit Judge* TATEL dissenting from the denial of rehearing en banc, in which *Circuit Judge* SENTELLE joins, is attached.

*Circuit Judges* EDWARDS, RANDOLPH and GARLAND did not participate in this matter.

TATEL, *Circuit Judge*, with whom SENTELLE, *Circuit Judge*, joins, dissenting from denial of rehearing en banc:

In my view, this case warranted *en banc* review because the panel's decision conflicts with well-established precedent of both the Supreme Court and this circuit. In *Webster v. Doe,* the Supreme Court held "that where Congress intends to preclude review of judicial claims, its intent to do so must be clear. . . . We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." 486 U.S. 592, 603 (1988) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). *See also Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 494-95 (D.C. Cir. 1988); *Ungar v. Smith*, 667 F.2d 188, 193 (D.C. Cir. 1981); *Ralpho v. Bell*, 569 F.2d 607, 620-21 (D.C. Cir. 1977). Here, the panel reads section 372(c)(10) to preclude review of Judge McBryde's as-applied constitutional claims even though the statute contains no language expressly barring review, and even though the legislative history may as easily be read to permit as to preclude federal court jurisdiction over such challenges. *See McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the United States*, 264 F.3d 52, 73-76 (D.C. Cir. 2001) (Tatel, J., dissenting). According to the panel, the purported "substantial redundancy" between review by an Article III court and by the Judicial Conference reflects Congress's intent to

preclude review of as- applied constitutional claims. *Id.* at 62. This position, however, rests not on primary evidence from the legislative history itself, but on a secondary inference drawn from the structure of the Act, and thus does not amount to the kind of "clear and convincing" evidence required by the Supreme Court and this circuit. *See Johnson v. Robison*, 415 U.S. 361, 371-75 (1974) (limiting its analysis of legislative history to affirmative statements of congressional intent); *see also Griffith*, 842 F.2d at 494-95 (same); *Ungar*, 667 F.2d at 193-96 & 195 n.2 (same); *Ralpho*, 569 F.2d at 620-22 (same). I respectfully dissent from the denial of rehearing *en banc*.

## APPENDIX G

### Excerpts From the Constitution of the United States

Article I, § 2, cl. 5

> The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Article I, § 3, cl. 6

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Article I, § 3, cl. 7

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

Article I, § 5, cl. 1

> Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Article I, § 5, cl. 2

> Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Article II, § 2, cl. 2

> He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two

thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article II, § 4

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III, § 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

amend. XXV, § 4

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the power and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

## APPENDIX H

### Judicial Conduct and Disability Act of 1980, as amended (28 U.S.C. § 372(c))

Title 28, § 372(c) of the United States Code:

(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint.

(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may –

(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

(B) conclude the proceeding if he finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly –

(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

A judge appointed to a special committee under this paragraph may continue to serve on that committee after becoming a senior judge or, in the case of the chief judge of the circuit, after his or her term as chief judge terminates under subsection (a)(3) or (c) of section 45 of this title. If a judge appointed to a committee under this paragraph dies, or retires from office under section 371(a) of this title, while serving on the committee, the chief judge of the circuit may appoint another circuit or district judge, as the case may be, to the committee.

(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council –

(A) may conduct any additional investigation which it considers to be necessary;

(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

(i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;

(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

(v) censuring or reprimanding such judge or magistrate by means of private communication;

(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 152 of this title;

(C) may dismiss the complaint; and

(D) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

(7)(A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the

council, that a judge appointed to hold office during good behavior may have engaged in conduct –

(i) which might constitute one or more grounds for impeachment under article II of the Constitution; or

(ii) which, in the interest of justice, is not amenable to resolution by the judicial council,

the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

(8)(A) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary. Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination.

(B) If a judge or magistrate has been convicted of a felony and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the Judicial Conference may, by majority vote and without referral or certification under paragraph (7), transmit to the House of Representatives a determination that consideration of impeachment may be warranted, together with appropriate court records, for whatever action the House of Representatives considers to be necessary.

(9)(A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.

(B) In conducting any investigation under this subsection, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331 of this title, shall have full subpoena powers as provided in that section.

(10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that--

(A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel

concludes that the complainant could offer substantial information.

Any such rule shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference. No rule promulgated under this subsection may limit the period of time within which a person may file a complaint under this subsection.

(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331 of this title, until all related proceedings under this subsection have been finally terminated.

(13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.

(14) Except as provided in paragraph (8), all papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding except to the extent that--

(A) the judicial council of the circuit in its discretion releases a copy of a report of a special investigative committee under paragraph (5) to the complainant whose complaint initiated the investigation by that special committee and to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

(C) such disclosure is authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

(15) Each written order to implement any action under paragraph (6) (B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331 of this title, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

(16) Upon the request of a judge or magistrate whose conduct is the subject of a complaint under this subsection, the judicial council may, if the complaint has been finally dismissed under paragraph (6)(C), recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge or magistrate during the investigation which would not have been incurred but for the requirements of this subsection.

(17) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

(18) The United States Court of Federal Claims, the Court of International Trade, and the Court of Appeals for the Federal Circuit shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this subsection.

## APPENDIX I

United States Court of Appeals,
Fifth Circuit.

In re John H. McBRYDE, U.S. District Judge, Petitioner.

**No. 95-11082.**

Decided July 2, 1997

Before HIGGINBOTHAM, EMILIO M. GARZA and DENNIS, *Circuit Judges*.

PATRICK E. HIGGINBOTHAM, *Circuit Judge*:

This petition arises out of the reassignment of two cases once pending before Judge McBryde in the Northern District of Texas. The two cases were styled *United States v. Michael Eric Satz* and *Sanjuana Torres, et al. v. Trinity Industries, Inc.* Judge McBryde requested the Judicial Council of the Circuit to invalidate these two reassignments. The Council found that "Judge Buchmeyer's factual predicate, on which he based his orders, was correct" and ultimately ordered their reassignment by its own order. Judge McBryde then filed a petition for mandamus with this court. The petition raises difficult questions of jurisdiction and carries us into uncharted waters of superintendence of Article III judges. We begin with a description of the two cases. We then return to the procedural history of the petition for mandamus and the action taken by the Council. Finally, we examine our jurisdiction and then the merits of Judge McBryde's petition.

I

A

Michael Satz was part of an organization that fraudulently offered loan referral services to individuals with poor credit ratings. The scheme made money by charging the

individuals a referral fee in advance, with "boilerrooms" operating in several states.[1]

Grand juries in both Phoenix, Arizona, and Fort Worth, Texas, indicted Satz. The Phoenix case was assigned to Judge Paul G. Rosenblatt, and the Fort Worth case by random assignment to Judge McBryde. The Phoenix case reached trial first in late 1994. Satz was convicted and taken into custody, and Judge Rosenblatt eventually scheduled sentencing for May 15, 1995. Shortly thereafter, a Northern District of Texas jury also convicted Satz, and Judge McBryde scheduled sentencing for April 28, 1995.

Investigations into the boilerrooms continued. In early 1995, Phoenix Assistant United States Attorney Darcy Cerow convened a grand jury, which began further investigations into Satz and three of his alleged co-conspirators: Lester Schwartz, Anthony Peter Schwartz, and Robert Schwartz. After extended negotiations, on March 27, 1995, the Schwartzes pled guilty before Judge Rosenblatt to certain crimes arising out of their boilerroom activities. In their plea bargains, the Schwartzes agreed to cooperate with law enforcement authorities in the continuing investigation of the boilerrooms. At the plea proceeding, the following colloquy occurred:

*The Court:* Anything further for the record?

*Ms. Cerow:* Your Honor, two things. One, I believe we need a number for the information.

*The Clerk:* CR 95-79.

*The Court:* Oh, yes.

*The Clerk:* They need to move to seal.

*The Court:* The motion to seal is granted.

The criminal minutes of the docket entries corresponding to each of the Schwartz cases, which apparently have been available to the public throughout the pendency of this affair, reflected the fact that the Schwartzes had pled guilty and stated, "govt's oral m/ seal granted."

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[1]The facts behind Satz's criminal enterprise are examined in more detail in *United States v. Gray*, 105 F.3d 956, 961-62 (5th Cir.), *cert. denied*, 520 U.S. 1150, 117 S.Ct. 1326, 137 L.Ed.2d 487 (1997); 520 U.S. 1246, 117 S.Ct. 1856, 137 L.Ed.2d 1057 (1997).

AUSA Cerow then contacted Northern District of Texas AUSA Phillip Umphres regarding the *Satz* case. According to testimony she later gave before Judge McBryde, Cerow told Umphres of Judge Rosenblatt's sealing order and of the ongoing investigation. In particular, Cerow related that the Phoenix investigation had produced documents suggesting that Satz's involvement in certain boilerrooms was more extensive than enforcement authorities in either Arizona or Texas had previously believed. If verified, the information would lead to a longer sentence for Satz. The testimony of AUSAs Cerow and Umphres conflicted regarding the extent to which Cerow informed Umphres of the government's position regarding the scope of Judge Rosenblatt's sealing order.

On April 4, 1995, AUSA Umphres moved to continue Satz's Texas sentencing until June 23. This motion was not under seal. The motion asked Judge McBryde to continue the sentencing then scheduled for April 28 for three reasons. The first was a problem of logistics. Satz was currently held in Arizona and had a sentencing scheduled there in May. The second was that AUSA Cerow was continuing the Arizona investigation into Satz's boilerroom activities and his association with certain co-conspirators, which the motion identified as the Schwartz family. The motion recited that the information thus far generated suggested that Satz may have been a bigger player in the boilerrooms than had previously been believed and that he may have committed perjury at his Texas trial. The motion further stated that AUSA Cerow planned to continue the investigation by asking an Arizona grand jury to subpoena bank records and live witnesses, perhaps leading to the prosecution of other unnamed individuals. The third reason to continue Satz's sentencing was that the Arizona and Texas pre-sentence reports calculated Satz's offense levels in part using some of the same conduct. A good faith argument existed that this double-use constituted double jeopardy. The Fifth Circuit had already held that this double-use did not violate double jeopardy principles. The Ninth Circuit had not yet decided the question. Thus scheduling the Texas sentencing after the Arizona sentencing would finesse any double jeopardy contention Satz

might later make. The motion did not mention Judge Rosenblatt's sealing order as a reason to continue sentencing.

Meanwhile, Satz had difficulty getting to Fort Worth for his scheduled sentencing. He filed a motion to be transferred to Fort Worth with the Arizona district court, which Judge Rosenblatt denied on April 17. At the eventual hearings in his court, Judge McBryde stated that upon receiving notice of this order, he called Judge Rosenblatt and got him to agree to transfer Satz to Fort Worth.

On April 18, Judge McBryde denied AUSA Umphres' motion to continue Satz's Texas sentencing. The denial order stated, "[t]he contents of the motion of the United States of America indicates that the government has additional information concerning the activities of defendant MICHAEL ERIC SATZ ('Satz') that could have relevance to the sentencing of Satz." Judge McBryde ordered the United States to deliver a supplementary written report to the Probation Office detailing all such relevant information and requested the Probation Office to write an addendum to the PSR.

On April 21, AUSA Umphres filed under seal a renewed motion to continue sentencing along with five exhibits. Again, the text of the motion itself did not mention a sealing order. Instead it stated that Umphres had delivered some material to the Probation Office, but that this material was cumulative to documents that office already possessed. Further documents remained in Arizona, but AUSA Umphres did not know of their exact contents. These documents suggested Satz's involvement in additional boilerrooms, but the information was as yet uncorroborated, and the Arizona investigation was continuing. According to the motion, "disclosure of the information set out in Exhibit A at this time [would] jeopardize [the] on-going grand jury investigation [in Arizona]." The motion to continue sentencing also asked Judge McBryde to order the Probation Office to keep all information secret from defendant Satz.

A memorandum from Umphres to the Probation Office was attached. It stated that AUSA Cerow had reached plea agreements with certain individuals above Satz in the boiler-room operation, and that these individuals had since been "debriefed." The memorandum explained that Cerow had

informed Umphres "that the plea agreements and factual resumes relating to the defendant have been filed under seal as [Cerow] wanted to keep the fact of their cooperation secret [from Satz] for the moment in order to avoid alerting other targets of her investigation, who[m] she did not identify." Finally, the memorandum stated that Postal Inspector Rex Whiteaker once possessed certain information, but that Cerow had asked Whiteaker to send all documents in his possession to Arizona and had told him that all information was covered by the grand jury secrecy rules embodied in Fed.R.Crim.P. 6(e).

Umphres also attached as an exhibit a letter dated April 20 from Cerow to Umphres that again emphasized the continuing grand jury investgation and the Rule 6(e) concerns about disclosing information. This letter, which did not mention a sealing order, included the following paragraph:

> If, through an order of the court, we were to invade the secrecy of the grand jury investigation at this time, the investigation would be severely compromised. Although the targets are probably aware of the investigation, they do not know the extent of the grand jury's knowledge of their activities. If the investigation were to become a matter of public record, the targets would be in a position to destroy documents, move assets to avoid forfeiture, and flee the country to avoid prosecution. These acts would essentially bring the grand jury investigation to a halt which would result in the non- prosecution of key players.

Later in the day on April 21, Judge McBryde ruled upon AUSA Umphres' latest motion. The order stated, "The material provided in the [government's] report and its attachments strongly indicates that one or more representatives of the United States of America has engaged in conduct calculated to frustrate the objectives of sentencing in this action and to cause noncompliance with the order signed by the court in this action on April 18, 1995." The order did not indicate that the government had raised the issue of the sealing order. Judge McBryde instructed AUSA Cerow, Postal Inspector Whiteaker, and defendant Satz to appear at an April 24 hearing and for the former two to bring with them all information potentially relevant to Satz's sentenc-

ing. The order stated that at the hearing the court would determine whether to proceed *in camera*.

On April 24, Judge McBryde began the first of three days of hearings on the *Satz* matter prior to sentencing. AUSA Cerow appeared with counsel from the Justice Department along with Inspector Whiteaker and defendant Satz. At this first hearing, Judge McBryde made clear his view that the government was attempting to manipulate the order of the Arizona and Texas sentencings in order to avoid double jeopardy problems. Judge McBryde ordered AUSA Cerow to turn over all information potentially relevant to sentencing Satz. In response, Cerow stated that three categories of information existed. The first was information generated in relation to a search warrant in Arizona. The second was information protected by the secrecy requirement of Rule 6(e). The third was information covered by a sealing order entered by Judge Rosenblatt. Cerow turned over the information in the first two categories. But she declined to provide information in the third category and stated that she had not brought those documents from Arizona. Citing Judge Rosenblatt's sealing order, Cerow's attorney also declined on her behalf to comply with Judge McBryde's order. Inspector Whiteaker refused to comply as well and referred the court to the sealing order and to Cerow's previous instructions that he send all information in his possession to Arizona. Cerow's attorney told Judge McBryde only that the sealing order was written and dated March 27.

According to Judge McBryde, this was the first he had heard of any sealing order. He asked why Judge Rosenblatt had entered it and what its contents were. Cerow and her attorney responded that answering either question would violate the sealing order. When Judge McBryde pressed to know the contents of the sealing order itself, Cerow's attorney responded that he had asked Judge Rosenblatt earlier that day to make available a redacted copy of the order, but that Judge Rosenblatt had refused to do so. Cerow and her attorneys repeatedly suggested that Judge McBryde call Judge Rosenblatt directly; Judge McBryde declined, stating "it's to the point where I should not bein the position [of] trying to persuade Judge Rosenblatt to do things." Judge McBryde concluded the April

24 hearing by suggesting his inclination to issue a show-cause criminal contempt order against Cerow or to dismiss the charges against Satz, or both.

The next day, April 25, Judge McBryde resumed hearings. He ordered Inspector Whiteaker to tell him who was present at the hearing when Judge Rosenblatt issued the sealing order. Inspector Whiteaker declined, citing the sealing order. Judge McBryde moved to a session *in camera*, ordered Satz and his attorney from the courtroom, and directed Cerow's attorney to tell the court more about the sealing order. Cerow's attorney stated that the order was written, was dated March 27, and was not entered in the Arizona *Satz* case. Cerow stated that the order had already prevented Judge McBryde from seeing information pertinent to Satz's sentencing. When Judge McBryde asked for further information, including the wording of Judge Rosenblatt's order, Cerow and her attorney also declined to answer. They stated that they had called Judge Rosenblatt the previous morning and asked him to release the sealed documents but that the Arizona judge had declined to make any information, including the wording of the sealing order, available for use in Fort Worth. After expressing his disappointment that the government had made no formal motion in Arizona to have the information released, Judge McBryde questioned Texas AUSA Umphres. Umphres disclosed that the Schwartzes, who had been mentioned in Satz's trial before Judge McBryde, were three of the targets of the investigation continuing in Arizona, and that certain defendants had pled guilty and were cooperating with the government. Umphres also stated that although he had known of the existence of a sealing order since early April, he had not known until the previous week that the Arizona U.S. Attorney's office was taking the position that the sealing order was as sweeping as AUSA Cerow's refusal to answer questions suggested.

Judge McBryde then moved back into public session and stated his belief that had there been a sealing order of the kind described by Cerow, he would have heard about it before the hearings began. Cerow responded that she had told Umphres of the order in early April, and that in her view the disclosure of information contained in Umphres' first motion for a continu-

ance, filed on April 4, itself violated Judge Rosenblatt's sealing order. Judge McBryde ordered a short recess.

When Judge McBryde resumed the hearings, Cerow's attorney stated that he had called Judge Rosenblatt again in an attempt to obtain confirmation on the sealing order. Judge Rosenblatt had apparently complied and faxed a short statement, the text of which read:

> On March 27, 1995, a criminal proceeding relating to a Northern District of Texas, Ft. Worth Division, 4:94-CR-094A, [sic] was filed in this Court. All matters pertaining to that proceeding were placed under seal by this Court and will so remain.

Judge McBryde responded to this fax with the following comment: "It's so vague and general it doesn't tell me any more than I've already learned from the people here. It doesn't tell me that that order is of such a character that it would be intended to override the provisions of the [Sentencing G]uidelines and of [18 U.S.C. § 3661] concerning sentencing information I'm required to have for sentencing purposes."

At some point on April 25, Judge McBryde received an additional fax from Judge Rosenblatt. In this letter, Judge Rosenblatt addressed Judge McBryde as follows: "[I]f you decide to go forward with the sentencing, under the circumstances, please keep in mind that eventually [Satz] will be returned to [Phoenix] for sentencing and whatever you do might have ramifications on my sentence. I ask you to please consider this and not jeopardize my case or any other proceedings pending in my court" (alterations added). Also on April 25, Judge McBryde again ordered Cerow to release the same information to the Fort Worth probation office. This order included a finding of fact that no sealing order preventing the disclosure of this information existed. In making this finding, Judge McBryde stated that he had relied upon the demeanor of AUSA Cerow and Inspector Whiteaker, the discrepancies in their testimony, the lateness of their reliance upon the sealing order as a reason to continue Satz's sentence, and the inherent implausibility of the proposition that one federal district judge would prevent another from using relevant information at a criminal sentencing.

Hearings resumed on April 26. After some further conversation, Judge McBryde stated that he interpreted Judge Rosenblatt's latest fax as verification that those in Phoenix were attempting to manipulate the order in which Satz was sentenced to prevent Satz from invoking double-jeopardy principles. After further discussion, Judge McBryde ordered the text of Umphres' second motion to continue sentencing unsealed and revealed to Satz and his counsel. The unsealing order reached the information filed under seal on April 21, including the attached exhibit disclosing the Schwartzes' guilty pleas and agreements to cooperate with the government to further the Arizona criminal investigation. The United States filed an emergency motion to stay the unsealing order, which this Court denied. Judge McBryde concluded the hearings with the following statements:

> I find that Darcy A. Cerow is in contempt of court in a number of respects. I find that she intentionally frustrated the objectives of my [April] 18, 1995 order directing that any additional information that has the potential to affect the sentencing of Satz, such additional information be delivered to the probation officer....
>
> I find that Darcy A. Cerow is in contempt of court for causing a violation of the April 21, 1995 order of the court which directed that the United States of America have present at the hearing held in this action on April 24, 1995, all information that is potentially relevant to the sentencing of Satz in this action. The record reflects that she had possession and control of information that was potentially relevant to the sentencing of Satz in this action, and she consciously did not produce it.
>
> I find that Darcy A. Cerow is in contempt of court for failing to comply with the (a) part of the order I signed yesterday, April 25 [because of the same conscious choice not to produce].
>
> . . . . .
>
> I find that Darcy A. Cerow is guilty of contempt of court because of her failure to answer questions she was ordered to answer during the course of the proceedings.... I find ... that the contention by Ms. Cerow that she was prohib-

> ited by a secrecy order [from following the above orders] is a fabrication and is not true....
>
> I don't believe Ms. Cerow believes that any order that has been entered that prohibits her from delivering that information. I find that she does not believe that any order prohibited her from complying with my orders.
>
> . . . . .
>
> The overall record reflects that all of this conduct and the waste of time we've had this week and leading up to this week has been a desire on the part of Ms. Cerow to have sentencing occur in the case in which she's a prosecutor first.... She's engaged in elaborate sets of activities in an effort to accomplish that, and in the course of doing so has engaged in falsehood and deception.

Judge McBryde concluded the hearing with a suggestion that the United States pursue an investigation of Cerow's conduct. The next day, Judge McBryde conducted Satz's sentencing hearing but did not sign a final judgment of sentence.

B

In October of 1990, a civil suit styled *Sanjuana Torres, Individually and ... (Grecia Torres, A Minor) v. Trinity Industries, Inc.* by random assignment fell to Judge McBryde. The suit arose out of the death of Mr. Raimundo Torres, Grecia Torres's father. The parties settled, and Judge McBryde signed a final judgment on December 20, 1991. Judge McBryde ordered the defendant to pay $40,000 to Grecia Torres. The final judgment also ordered the Clerk of the Northern District to "invest the amount deposited in an interest bearing account at the highest available rate of interest" until Grecia Torres reached majority.

The clerk's office did not follow this order. The plaintiff's attorneys informed a financial deputy for the district court that depositing the funds in the U.S. would have adverse tax consequences for Grecia Torres and asked that the clerk hold the funds until the attorneys could set up a Mexican trust fund. Neither the attorneys nor the deputy followed up on this plan, and the $40,000 stayed in the court's treasury for more than three years earning no interest. Intervening audits of the clerk's office's accounts did not uncover the mistake. Nancy Doherty,

Clerk of the Northern District, testified at the eventual hearing of the Fifth Circuit Judicial Council's Special Investigative Committee that her office discovered the mistake in early March, but that she first contacted the Administrative Office of the United States Courts to find a solution to the problem before writing to Judge McBryde. On March 24, 1995, Clerk Doherty informed the attorneys for Grecia Torres of the error in writing and sent a copy to Judge McBryde. By this time, the Administrative Office had suggested that Grecia Torres' only remedy was through the Federal Tort Claims Act. That process would take approximately ten weeks.

Six days later, Judge McBryde issued an order in the Torres case. He explained that he did not agree that the FTCA was Grecia Torres' exclusive remedy:

The court is disappointed that there would even be a suggestion that Grecia Torres, a minor, acting through a person or persons who might legally be qualified to act on her behalf, would be required to go to the time and expense to exhaust administrative remedies, through a tort claims process, before being able to obtain relief from violation of an order of this court.... If such order of this court is to have any integrity, enforcement of the order should be the means of causing Grecia Torres to be made whole for loss resulting from violation of the order (assuming that the clerk is unwilling or unable on her own initiative to take proper corrective measures by causing a sufficient deposit to be made to the minor plaintiff's account).

Judge McBryde's order directed Clerk Doherty to file an analysis and supporting documents to determine the amount of interest Torres had lost.

At the suggestion of Judge Buchmeyer,[2] Clerk Doherty responded by letter to Judge McBryde, attaching the requested financial information. Following his suggested language, despite her stated reservations that the phrasing would anger the court, the letter expressed shock and disappointment that Judge McBryde felt it necessary to enter an order to resolve the matter. The letter also informed Judge McBryde that the Clerk's office, the Administrative Office, and the plaintiff's attorneys were working together to reimburse Torres' account via an FTCA action. According to Clerk Doherty, Grecia Torres's interest income would have been between $3,762.68 and $8,112.58, depending on how the clerk's office had decided to invest.

On April 25, Judge McBryde responded with a second order. This order labeled Clerk Doherty's letter in response "so unprofessional and so disrespectful of the undersigned judge and court, and manifest[ing] such a high level of insolence, that it borders on, if it does not constitute, contempt of court by one of its statutory officers." In a long footnote, the order accused Doherty of "insolence," "lack of respect," attempting to "avoid direct confrontation of the consequences of noncompliance with the judgment," and a "lack of understanding [of] the court's responsibilities." The order further suggested that Doherty was "collaborating with the attorney for the plaintiffs in pursuing a remedy that ... the court considers to be inappropriate." The order concluded by striking Doherty's last letter and ordering her to file into the *Torres* record additional documentation designed to calculate the amount of interest income lost to the Torres account.

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[2]Chief Judge Buchmeyer's memorandum opinion in *Torres* indicated that he had become aware of the case when Clerk Doherty came to him seeking advice in how to respond to Judge McBryde's March 30 order. The Chief Judge also stated that he became aware of the *Satz* case when members of a United States Attorney's office approached him to ask his assistance in having an appellate judge available to consider an application for a writ of habeas corpus directing the release of AUSA Cerow, should Judge McBryde hold her in contempt.

C

1

On April 27, Judge Buchmeyer, Chief Judge of the Northern District of Texas, entered orders vacating Judge McBryde's order of April 25 and reassigning the *Torres* case from Judge McBryde to himself. On May 1, Judge Buchmeyer issued a second order vacating Judge McBryde's findings as to contempt and reassigning the *Satz* case from Judge McBryde to himself. Both orders were filed under seal. Judge Buchmeyer sealed the entirety of the *Satz* and *Torres* files. Both orders cited 28 U.S.C. § 137 as authority to reassign the cases. The timing of the events and the testimony of Judge McBryde before the Special Investigatory Committee suggest that Judge Buchmeyer did not have the transcripts, orders, or supporting documents available to him in either case when he entered his orders reassigning the cases to himself and vacating Judge McBryde's prior actions. Judge Buchmeyer testified that he spoke only with AUSA Umphres, never with Cerow or her attorney.

On May 3, Judge McBryde entered an order calling reassignment of the *Satz* case "rash conduct" and concluding that the May 1 order was "void in its entirety." On the same day, Judge McBryde signed a judgment of conviction and sentence for Satz. The next day, Chief Judge Buchmeyer issued an additional order resealing the entire Satz file, declaring Judge McBryde's May 3 order void in its entirety, and directing the clerk to file only materials signed by Judge Buchmeyer in the *Satz* case. By "dear colleague" letters dated May 1 and 4, Judge Buchmeyer informed the other judges of the Northern District of Texas of his actions.

On May 12, 1995, defendant Satz filed a petition for a writ of habeas corpus, stating that he currently stood imprisoned without having been sentenced. The petition recited that Chief Judge Buchmeyer had reassigned *Satz* to himself, but that Judge McBryde had signed the sentencing order. Two months later, Judge Buchmeyer denied Satz's petition on the ground that Judge McBryde had vacated the May 1 Buchmeyer reassignment order before signing the judgment of conviction and sentence, and Satz was thus imprisoned pursuant to a valid

judgment and sentence. Satz apparently did not appeal this ruling. *See Gray,* 105 F.3d 956.

On August 25, Judge Buchmeyer filed an opinion and order in the *Satz* case. The order reflects a review of the transcripts of the *Satz* hearings held on April 24-26. The order also relied upon a letter, written at the request of Chief Judge Buchmeyer, from Janet Napolitano, United States Attorney for the District of Arizona. The letter commented on the effects of Judge McBryde's orders. It is unclear what if any additional information was available to him, although it does not appear that Judge Buchmeyer heard additional sworn testimony.

Judge Buchmeyer found that the representations of AUSA Cerow and her attorney,as well as the statements made by Inspector Whiteaker, during the April 24-26 hearings were entirely truthful. He also stated that Judge McBryde's treatment of Judge Rosenblatt constituted an "unwarranted attack." The order described Judge McBryde's April 26 decision to unseal the text of the second motion to continue and attached documentation filed by AUSA Umphres on April 21 under seal. In a footnote, the order stated that "[a]ccording to *Janet Napolitano,* United States Attorney for the District of Arizona, this disclosure by Judge McBryde 'undermined the new [grand jury] *investigation since, by informing Satz of the nature of the Arizona investigation, the Court also informed the targets of that investigation. Consequently, several persons will probably avoid prosecution altogether . . ,' "* (alteration and italics in original).[3]

The asserted damage to the grand jury investigation was apparently due to the disclosure of information in the attachment to the April 21 motion. Attached as Exhibit A, the memorandum from AUSA Umphres to the Probation Office disclosed that certain defendants were cooperating in the investigation. On the basis of this disclosure, United States Attorney Napolitano and AUSA Cerow concluded that defen-

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[3]AUSA Cerow testified at the eventual hearing before the Special Investigatory Committee that at least one person, whom she did not identify, had escaped prosecution altogether.

dant Satz would warn the targets of the Arizona investigation and that those individuals would move or destroy documents, and therefore that they could not in good faith apply for a warrant to search for those documents. Curiously, this effect of Judge McBryde's order is asserted in spite of disclosures made by AUSA Umphres' first motion for a continuance, filed on April 4 not under seal and presumably served on Satz's attorney. This first motion had disclosed the fact that the Arizona investigation had focused in part on the Schwartz family, had generated a significant record, and had revealed the possibility that Satz was more involved in the criminal enterprise than had been previously believed. Documents filed before this court suggest that the docket sheets in the Schwartz family criminal prosecutions were available to the general public throughout the pendency of this litigation via an Arizona computer system. These docket sheets reflected the Schwartzes' guilty pleas and the sealing of their cases.

Judge Buchmeyer's order continued by stating that Judge McBryde had repeatedly rejected the government's suggestions that he call Judge Rosenblatt or grant a continuance. The order continued, "In lieu of a continuance, the government suggested that Judge McBryde review material in camera so that public disclosure would not be made. He rejected that option." Chief Judge Buchmeyer concluded the opinion by admitting that 28 U.S.C. § 137 did not grant him the power to "*reassign cases because of a disagreement with how a case was handled* ... [or] because litigants are disgruntled, or because of some desire to place [him]self in the role of a 'quasi-appellate court' that reviews the decisions made by other judges in this district" (italics in original). Labeling any such argument in this case "ridiculous," Judge Buchmeyer explained that this case was "*an extraordinary situation* " (italics in original) because Judge McBryde made an unwarranted attack upon Judge Rosenblatt and because Judge McBryde had jeopardized a grand jury investigation by unsealing information as a direct result of clearly erroneous findings of fact.

In a separate order also issued in August, Judge Buchmeyer granted the United States' previously filed "Motion for Clarification." The order recited the potential difficulties

under *Giglio v. United States,* 405 U.S. 150, 153-54, 92 S.Ct. 763, 765-66, 31 L.Ed.2d 104 (1972), and *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), created by Judge McBryde's findings that AUSA Cerow and Inspector Whiteaker had lied while under oath. The order vacated these findings as having "no factual basis" and found that "AUSA Cerow and Inspector Whiteaker were at all times truthful in their dealings with Judge McBryde." This obviated the need for any effort to obtain review by this Court of Judge McBryde's order, the reason representatives of the United States Attorney's office consulted Judge Buchmeyer in the first place.

2

On July 21, Judge Buchmeyer filed another memorandum in the *Torres* case labeling the reassignment of that case necessary "to avoid public humiliation and damage to the District Clerk, as well as to the reputation of this Court." After detailing the facts, the Chief Judge referred to his opinion in *Satz* and again rested his reassignment order on 28 U.S.C. § 137.

D

After a meeting of the judges of the Northern District of Texas, about which the documents before us provide little information, Judge McBryde filed a "Request for Assistance in Resolution of Dispute" before the Fifth Circuit Judicial Council. Apparently, the Department of Justice also wrote Fifth Circuit Chief Judge Politz regarding *Satz.* Chief Judge Politz ordered that the Request for Assistance be referred to a "Special Investigatory Committee," which would also consider matters arising out of the DOJ's letter pursuant to 28 U.S.C. §§ 372(c)(1) & 372(c)(5). The committee, comprised of three circuit judges and two district judges, held a hearing on October 19. It heard testimony from Judge McBryde, but refused his request to be present at the taking of the testimony of witnesses, including Judge Buchmeyer. One member of the committee expressed concern that the transfers by Judge Buchmeyer could effect an end-run around the appellate process. In response, Judge Buchmeyer emphasized that an appeal of contempt in the *Torres* case would result in unacceptably damaging media exposure for Clerk Doherty and that he had a responsibility to

protect the clerk of his court, as well as Judge Rosenblatt, who might not have had any remedy for Judge McBryde's "abuses."

Clerk Doherty and AUSA Cerow also testified before the committee. The committee then presented a recommendation to the Fifth Circuit Judicial Council. The documents before us do not describe the nature of this untranscribed presentation.

On October 20, the Judicial Council denied Judge McBryde's Request for Assistance by an order stating:

> Our review of the record along with our independent investigation in these two cases overwhelmingly demonstrates that Judge Buchmeyer's factual predicate, on which he based his orders, was correct. Judge McBryde's conduct in both cases was unwarranted.
>
> In *Satz,* Judge McBryde's attack on AUSA Darcy A. Cerow and Postal Inspector Rex Whiteaker and his accusations against them of lying and contempt of court were baseless, threatening irreparable damage to the professional reputations and careers of both Ms. Cerow and Mr. Whiteaker. The record and our investigation confirm that the statements and conduct of AUSA Darcy Cerow and Postal Inspector Rex Whiteaker were truthful, professional, and appropriate under the circumstances. In addition, Judge McBryde's refusal to accord proper respect to the orders of another United States District Judge which sealed sensitive Rule 11 proceedings undermined a grand jury investigation.
>
> In *Torres,* our investigation and the record confirmed that Judge McBryde's conduct against Nancy Doherty, the clerk of the Northern District of Texas, was unwarranted, abusive, and threatened to damage Ms. Doherty's professional reputation. We are persuaded that Ms. Doherty took appropriate action upon being advised of the problems regarding the deposit of funds held for the minor and conducted the affairs of her office in a professional manner.
>
> We need not decide whether 28 U.S.C. § 137 authorized Chief Judge Buchmeyer's action in reassigning these cases because the Judicial Council unanimously concludes that Judge McBryde's above described conduct is an impediment to the effective administration of justice. Therefore under the authority of 28 U.S.C. § 332 we reassign *Satz* and

*Torres* to Chief Judge Buchmeyer effective May 1, 1995 and April 27, 1995.

Although Judge McBryde never acquiesced in the transfers, the Council did not seek enforcement of its order in the district court. In practical and real terms, enforcement of the Council's order had already been accomplished by the combined effect of the order of the district court and the later order of the Council, tailored to reach back to the original date of each of the district court's orders transferring the cases. Judge Buchmeyer, who already claimed that *Satz* and *Torres* were on his docket based on his power under § 137, retained the cases without entering any formal acknowledgment of the Council's reassignments.

II

We pause to note that the conflict between Judge McBryde on the one hand and Judge Buchmeyer and the Council on the other hand began as a struggle between conflicting interpretations of the facts. As we read the record, finders of fact could reasonably defend either side. The reasonableness of both understandings does not play a determinative role in our legal analysis, but appreciating the roots of this case leads to an appreciation of the power that the Chief Judge of the District and the Council exercised when they took the *Satz* and *Torres* cases away from Judge McBryde.

Chief Judge Buchmeyer and the Council chose to believe AUSA Cerow's insistence that Judge Rosenblatt's sealing order prohibited her from answering Judge McBryde's questions. Judge Rosenblatt's two faxes confirmed that there was a sealing order, and their curtness suggested that its scope was broad. From the point of view of Chief Judge Buchmeyer and the Council, Judge McBryde's reputation for running a tight ship made these litigants wary of giving him information, which in turn made Judge McBryde suspicious and caused an escalation of distrust. It was not unreasonable for Chief Judge Buchmeyer and the Council to attribute difficulties in the *Satz* case to misunderstandings and to give credence to AUSA Cerow based on the evidence of the sealing order and the presumption that an attorney would not fabricate the contents of a judicial order.

In *Torres,* Judge McBryde threatened Clerk Doherty with contempt based on her "insolence" and accused her of conspiring with the plaintiffs' attorney to institute a cumbersome remedy in violation of instructions from the court. As a behind-the-scenes participant, Judge Buchmeyer had valid reasons to dismiss Judge McBryde's suspicions. Indeed, he knew that he himself was the author of the remarks that Judge McBryde viewed as insolent. The Council adopted Judge Buchmeyer's view of Clerk Doherty's actions, seeing her as a well-meaning public servant attempting to smooth over a bureaucratic glitch.

But we cannot dismiss out of hand Judge McBryde's understanding of the facts in the *Satz* and *Torres* cases either. His suspicions in *Satz* were understandably heightened when, during the second day of hearings, Umphres stated that he did not know until the latter part of April that the Arizona U.S. Attorney's office was portraying the sealing order as protecting virtually every piece of information about the Arizona *Satz* litigation. In retrospect, Judge McBryde could piece together a number of facts that pointed to the larger conclusion that AUSA Cerow was lying. Umphres's first motion to continue sentencing was not filed under seal even though it mentioned the Schwartz family and the further investigations. Umphres's second motion to continue sentencing was filed under seal, but the attached letter from AUSA Cerow suspiciously neglected to mention any sealing order as a reason to keep the Arizona grand jury investigation a secret. Even after moving the hearing *in camera* and excluding Satz's counsel, AUSA Cerow and her attorney were extraordinarily reticent about information Judge McBryde needed for sentencing. They refused even to disclose the wording of the order. Judge Rosenblatt was understandably cautious. The result was that dispatches from Judge Rosenblatt were vague and hardly falsified Judge McBryde's hunch that AUSA Cerow was being less than forthright. At the April 25 proceedings, Judge McBryde delivered a cogent statement of his reasons for rejecting AUSA Cerow's reliance on a broad sealing order. His conclusion flowed not only from the implausibility of such an order and the fact that the government raised the

order long after it knew it would be relevant, but also from the demeanor of the witnesses and counsel's evasiveness.

Judge McBryde knew that AUSA Cerow had an incentive to delay sentencing in the Northern District of Texas. According to the government's own motions, sentencing in the Fort Worth case might, under Ninth Circuit law, limit the sentences available in the Phoenix case. Both the government and Judge Rosenblatt apparently expected Judge McBryde to hold off on sentencing in order to ensure that Satz would receive as much punishment as possible. The delaying tactics might also have been due to AUSA Cerow's interest in obtaining sentences in her case before the Northern District of Texas handed down sentences. We need not attribute paranoia or irrationality to Judge McBryde to explain his view that AUSA Cerow's contentions about the sealing order were untruthful. Even if there was a sealing order, there were legitimate reasons to think that its scope was not as sweeping as AUSA Cerow contended.

Judge McBryde's understanding of the factual basis for suspecting that Clerk Doherty was on the verge of contempt was similarly within the bounds of reason. He knew that the $40,000 had earned no interest because plaintiffs' counsel requested the clerk's office not to deposit the money in a U.S. account and that the clerk's office had complied, contrary to Judge McBryde's express order. He also knew that Clerk Doherty was cooperating with the Administrative Office to accomplish an end that his prior order rejected. Furthermore, from Judge McBryde's vantage point, Doherty did not respect his position enough to refrain from criticizing his earlier order in a letter to the court. Judge McBryde could have handled the matter more sensitively. We need not agree with his conclusion to conclude that his view of the letter as reflecting "insolence" was not irrational. It is evident that the tone of language used by the Chief Judge differed significantly from the tone Clerk Doherty would have preferred. She is an experienced clerk with an outstanding reputation. Part of her success has undoubtedly been an ability to handle the egos that sometimes flourish under the shelter of Article III. In short, the choice of language was no fault of the clerk, but Judge McBryde had no way to know that.

As in the *Satz* case, there was room for disagreement about whether those on the receiving end of Judge McBryde's barbs acted culpably.

III

Judge McBryde invokes 28 U.S.C. § 1651(a) in his petition for a writ of mandamus, and that is ultimately where our jurisdiction rests. Section 1651(a) authorizes this court to issue all writs "necessary and appropriate in aid of [its] jurisdiction." Establishing jurisdiction to entertain Judge McBryde's petition requires that we answer two questions. First, do we have jurisdiction to issue a writ to the Judicial Council? If not, can we entertain Judge McBryde's suit based on our jurisdiction over the Northern District of Texas? Only after we have established our jurisdiction to issue a writ can we examine the propriety of the orders to which Judge McBryde objects.

A

This court has joined the D.C. Circuit in interpreting section 1651(a) as not authorizing a court of appeals to issue a preemptory writ regarding a case over which it would never have appellate jurisdiction. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants,* 17 F.3d 130, 133 (5th Cir.1994) ("As we have no statutorily conferred jurisdiction over the actions of the Director, the All Writs Act would not provide this Court with jurisdiction to compel action by the Director."); *Telecommunications Research & Action Center v. FCC,* 750 F.2d 70, 79-80 (D.C.Cir.1984); *In re Stone,* 569 F.2d 156, 157 (D.C. Cir.1978).[4]

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[4]These cases did not decide the inherent power of federal courts, power not emanating from § 1651(a), to issue preemptory writs to any official of the United States upon a showing of clear entitlement to relief. Such a power might be derived from the historical ability of the common law courts to compel the performance of ministerial duties by those, such as executive officials, whose actions are not normally the subject of appellate review. *See Chandler v. Judicial Council of the Tenth Circuit of the United States,* 398 U.S. 74, 111-117, 90 S.Ct. 1648, 1667-1670, 26 L.Ed.2d 100 (1970) (Harlan, J., concurring). However, we abstain from exercising any inherent power we may have in this case. Congress has expressed its preference that the district courts exercise this type of general power. *See* 28 U.S.C. § 1361 ("The district courts shall have original jurisdiction of any

We have no direct appellate jurisdiction over the Council's order. We have only the jurisdiction that Congress grants us by statute. Despite the suggestionsof Justices Harlan, Black, and Douglas in *Chandler,* 398 U.S. at 111-117, 133-135, 90 S.Ct. at 1667-1670, 1679-1680,[5] the circuits have long since concluded that section 1651(a) is not an independent grant of jurisdiction.[6] Nor do we have appellate jurisdiction by virtue of some other statute. Section 372(c)(10) of Title 28 grants appellate jurisdiction over certain judicial council action to the Judicial Conference of the United States, not to this court.[7]

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action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."); *see also La Buy v. Howes Leather Co.,* 352 U.S. 249, 265-66, 77 S.Ct. 309, 318-19, 1 L.Ed.2d 290 (1957) (Brennan, J., dissenting). *But see In re Imperial "400" National, Inc.,* 481 F.2d 41, 42 (3d Cir.) (affirming a district court's conclusion that it lacked jurisdiction to mandamus a judicial council), *cert. denied,* 414 U.S. 880, 94 S.Ct. 71, 38 L.Ed.2d 125 (1973). To the extent that Judge McBryde wishes to invoke the modern analogy to the historical power of the common law courts, he has gone to the wrong court.

[5]*See also United States v. Malmin,* 272 F. 785, 791 (3d Cir.1921) (holding that the predecessor to § 1651, which did not include the "necessary in aid of their jurisdiction" language, provided the court with jurisdiction to issue a writ to an unlawfully ousted district judge ordering him to resume his duties).

[6]*See, e.g., White v. NFL,* 41 F.3d 402, 409 (8th Cir.1994), *cert. denied,* 515 U.S. 1137, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995); *Telecommunications Research,* 750 F.2d at 77; *Baker Perkins, Inc. v. Werner & Pfleiderer Corp.,* 710 F.2d 1561, 1565 (Fed.Cir.1983); *Starbuck v. City & County of San Francisco,* 556 F.2d 450, 459 n.18 (9th Cir.1977); *Commercial Security Bank v. Walker Bank & Trust Co.,* 456 F.2d 1352, 1355 (10th Cir.1972); *see also Chandler,* 398 U.S. at 86, 90 S.Ct. at 1654 (majority opinion) ("As the concurring and dissenting opinions amply demonstrate, finding the prerequisites to support a conclusion that we do have appellate jurisdiction in this case would be no mean feat.").

[7]Note that if one treats the Council's action against Judge McBryde as a complaint under 28 U.S.C. § 372(c), in spite of the Council's failure to provide the procedural safe-guards specified in 28 U.S.C. § 372(c)(11), then Congress has made crystal clear its intent that the federal courts as such

Judge McBryde identifies no statute granting a right of review of Judicial Council action to this court, and we have found none.

Mandamus might lie if we view the Council as an administrative body subservient to the judiciary. A collection of employees facilitates the work of the courts. Clerks, sheriffs, and bailiffs are prime examples. The courts have power over these officers simply because they are instruments through which the courts function. Power springs in part from statute but also in part from the nature of the administrative services these officers perform and their inherently subordinate role within the system.

Some authority supports the theory that the Judicial Council is an administrative body subordinate to the Fifth Circuit. The *Chandler* court characterized judicial councils as administrative bodies in dicta. 398 U.S. at 86 n. 7, 90 S.Ct. at 1655 n. 7. On occasion, the circuits have agreed. *See, e.g., Henry v. United States,* 432 F.2d 114, 119-20 (9th Cir.1970) ("It is true that members of a Court of Appeals, meeting as a Judicial Council, exercise certain supervisory powers for the expeditious administration of the business of the courts within its circuit, but they act as a council, not a court."), *modified,* 434 F.2d 1283, *cert. denied,* 400 U.S. 1011, 91 S.Ct. 576, 27 L.Ed.2d 625 (1971); *see also In re Petition to Inspect & Copy Grand Jury Materials,* 735 F.2d 1261, 1271 (11th Cir.), *cert. denied,* 469 U.S. 884, 105 S.Ct. 254, 83 L.Ed.2d 191 (1984). In addition, the function assigned to the Council suggests that it is analogous to a clerk or a bailiff, in that both assist in the process of orderly decisionmaking accomplished by the court. *See* 28 U.S.C. § 332(d)(1) (providing that each judicial council should

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exercise no appellate jurisdiction. 28 U.S.C. § 372(c)(10) ("Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise."). *See also United States v. Washington,* 98 F.3d 1159, 1164-65 & n. 2 (9th Cir.1996) (Kozinski, J., concurring) (noting that litigants who believe a judge suffers from a mental disability must complain to the circuit judicial council and can obtain review of the council's decision only from the Judicial Conference), *petition for cert. filed,* 65 U.S.L.W. 3713 (U.S. Apr. 7, 1997) (No. 96-1607).

make orders as necessary for the effective administration of justice).

The presence of circuit and district judges on the Council adds nothing to our power. It would not matter if the Council were composed of the nine members of the Supreme Court; when the Justices acted in their capacity as members of the Council, their power and role would be that of the Council, not of the Supreme Court.

Even if the Judicial Council often or even primarily acts as a subordinate administrative body, it acted as a court in this case. "'A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.'" *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 477, 103 S.Ct. 1303, 1311, 75 L.Ed.2d 206 (1983) (quoting *Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 224, 29 S.Ct. 67, 68, 53 L.Ed. 150 (1908)). That is exactly what the Council did here. *See In re Petition,* 735 F.2d at 1271 (holding that a judicial council disciplinary proceeding is closely analogous to a "judicial proceeding" within the meaning of Fed.R.Crim.P. 6(e)(3)(C)(i)).

Other characteristics of the Council's actions in this case suggest that this proceeding was judicial in nature. The Special Investigative Committee took sworn testimony and examined the records of actual cases. It issued an order transferring a case from one judge to another because of alleged misconduct, just as the circuits have done in the past. *See, e.g., United States v. Jacobs,* 855 F.2d 652, 656-57 (9th Cir.1988) (holding that a judge's misconduct in a particular case warranted reassignment). The stigmatizing effect of the comments issued in the context of the Judicial Council's order support an analogy to disbarment proceedings, which courts have characterized as judicial. *In re Palmisano,* 70 F.3d 483, 484-85 (7th Cir.1995) (characterizing disbarment proceedings as judicial while deciding whether an appeal from such proceedings lies to the circuit or to the circuit council), *cert. denied,* 517 U.S. 1223, 116 S.Ct. 1854, 134 L.Ed.2d 954 (1996). In this regard, it is no accident that all members of the judicial councils enjoy Article III status; separation of powers principles might not permit a body

otherwise composed to exercise some of the powers the Council has at its disposal, including those exercised in this case.

Whether the Judicial Council is an arm of the executive branch or the judiciary is irrelevant to the question of our appellate jurisdiction. *See Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 224, 29 S.Ct. 67, 68, 53 L.Ed. 150 (1908) (defining a "judicial inquiry"). Even if the Council functioned as an Article III body--a conclusion that one might reach on the basis of the Article III status of its members as well as the nature of the order it entered--it functioned as a body over which we lack *direct* appellate jurisdiction. By analogy, we lack jurisdiction over district courts outside of this circuit, and thus cannot issue mandamus running to them. The question of whether the Judicial Council is a judicial body, or functioned as a judicial body in this case, is of importance only if Judge McBryde should seek relief in the Supreme Court. *See Chandler*, 398 U.S. at 86, 111-117, 133-135, 90 S.Ct. at 1654-1670, 1678-1679.

We conclude that the facts presented in this case do not permit us to issue a writ of mandamus directly to the Council. We need not decide whether other cases might present circumstances amenable to the exercise of direct scrutiny of council decisions under the All Writs Act.

B

That we lack both direct appellate jurisdiction over the Council's order and inherent jurisdiction to issue a writ of mandamus directly to the Council as an administrative body of this court does not deprive us of jurisdiction to entertain Judge McBryde's petition for a writ of mandamus running to the Northern District of Texas or its Chief Judge. The All Writs Act gives us jurisdiction to issue a writ of mandamus to Chief Judge Buchmeyer. The inescapable fact is that orders issued under § 332 are enforceable only through the district court, and, of course, we can review the actions of the Northern District of Texas.

The Council's retroactive order transferring *Satz* and *Torres* to Chief Judge Buchmeyer could do nothing more than instruct the Northern District of Texas to enter such an order. The Council may issue necessary orders, but these two cases

were not pending before the Council. It is no empty formalism to acknowledge that the Council's orders are implemented by the district court. By necessity, the Council's order was a directive to the district court. Because the only orders transferring cases came from within the Northern District of Texas, our inability to issue a writ of mandamus to the Council does not stand in the way of our entertaining Judge McBryde's petition.

Practical mechanics aside, under the Council's organic statute, the order the Council entered in this case was a directive to the Northern District of Texas to put the Council's instructions into effect. Nothing in 28 U.S.C. §§ 331-335, which create and govern the judicial councils, can be read to empower the Council to issue a self-executing order transferring cases from one district court judge to another. Rather, judicial officers and employees of the circuit are to "promptly carry into effect all orders of the judicial council." 28 U.S.C. § 332(d)(2). The statute requires that a judicial council look to the courts to enforce compliance with its orders; a council can remedy a failure to comply with its orders only by "institut[ing] a contempt proceeding in [a] district court in which the judicial officer or employee of the circuit who fails to comply with the order ... shall be ordered to show cause before the [district] court why he or she should not be held in contempt." *Id.* The mechanism in § 372 differs fundamentally from the mechanism in § 332. For example, § 372 contemplates council orders suspending further assignment of cases to a judge under investigation for misconduct. *See* 28 U.S.C. § 372(c)(6)(B)(iv). It does not mention enforcement through ordinary judicial channels.[8] Instead, it authorizes a council to notify a judge under investigation directly of its actions. 28 U.S.C. § 372(c)(6)(D). These separate statutory structures highlight the central role of the district court in effecting council decisions made under the rubric of § 332. Significantly, Congress has not withdrawn jurisdiction to consider the validity of council orders

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[8]There is one isolated exception to the absence of ordinary judicial enforcement from § 372. Section 332(d)(2) allows a council or a special investigative committee formed under § 372(c)(4) to pursue contempt proceedings to force compliance with a subpoena.

issued under § 332 for which enforcement is sought. By contrast, it did so with § 372 proceedings. *See Webster v. Doe,* 486 U.S. 592, 603, 108 S.Ct. 2047, 2053, 100 L.Ed.2d 632 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear."); *Yakus v. United States,* 321 U.S. 414, 430-31, 64 S.Ct. 660, 669-70, 88 L.Ed. 834 (1944) (holding that Congress "gave clear indication that the validity of the Administrator's regulations or orders should not be subject to attack in criminal prosecutions").

Our jurisdictional analysis is unaffected by the fact that Judge Buchmeyer's orders were entered before the Council's decision. By affirming the factual predicate of transfer orders first issued by the district court and making its purported transfer orders effective on the dates of his original transfer orders, the Council has achieved enforcement of its retroactive order. Our jurisdiction in this case, then, runs not to a direct examination of the Council's order, but rather to an examination of the judicial officers' or employees' actions in implementing that order. Whatever the Council's order purported to do, the Council could not under § 332 itself move the cases over the objection of Judge McBryde to Chief Judge Buchmeyer.

We review the transfer of the cases as acts of officers of the Northern District of Texas, and we review the propriety of the Council's order only insofar as it may justify or fail to justify the officers' actions. *See In re Imperial "400" National, Inc.,* 481 F.2d 41, 42 (3d Cir.) (noting that a circuit court may indirectly review the action of a judicial council in the process of reviewing a district court's order), *cert. denied,* 414 U.S. 880, 94 S.Ct. 68, 38 L.Ed.2d 125 (1973).[9]

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[9]Although there is some authority to the contrary, the circuits have regularly met challenges to a judicial council's actions on the merits without hint that council decisions are immune from ordinary judicial scrutiny. *In re Burley,* 738 F.2d 981, 985 (9th Cir.1984); *White Motor Corp. v. Citibank, N.A.,* 704 F.2d 254, 262 (6th Cir.1983); *Hilbert v. Dooling,* 476 F.2d 355, 359-62 (2d Cir.), *cert. denied,* 414 U.S. 878, 94 S.Ct. 56, 38 L.Ed.2d 123 (1973); *Jimenez v. Aristeguieta,* 311 F.2d 547, 554 (5th Cir.1962), *cert. denied,* 373 U.S. 914, 83 S.Ct. 1302, 10 L.Ed.2d 415 (1963). *But see In re Imperial "400",* 481 F.2d at 50 (Lumbard, J., dissenting) ("No district judge or panel of the Court of Appeals for the Third Circuit, no matter how

The Tenth Circuit has by mandamus voided assignment of a case to an improper district judge, as we would do here. *Utah-Idaho Sugar Co. v. Ritter,* 461 F.2d 1100 (10th Cir.1972); *Kerr-McGee Corp. v. Ritter,* 461 F.2d 1104 (10th Cir.1972). In *Utah-Idaho* and *Kerr-McGee,* a chief judge of a district assigned himself certain cases in violation of an order of the Tenth Circuit Judicial Council. The Tenth Circuit found that a "writ of mandamus is essential to continuation of fair division of cases within the District of Utah and in implementation of the prior orders of the Judicial Council." *Utah- Idaho,* 461 F.2d at 1104. Although the Tenth Circuit did not articulate a theoretical justification for the use of the mandamus device in these cases, such an articulation is not difficult. Since *La Buy v. Howes Leather Co.,* 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957), the courts of appeals have possessed the power to issue supervisory writs of mandamus in order to prevent practices posing severe threats to the proper functioning of the judicial process. See also Mallard v. United States District Court, 490 U.S. 296, 309, 109 S.Ct. 1814, 1822, 104 L.Ed.2d 318 (1989) (describing the broad power available to the federal appellate courts under the supervisory writ doctrine). As we will illustrate, transferring *Satz* and *Torres* from Judge McBryde threatened the proper functioning of the judicial process here because reassignment of cases in response to disagreement with substantive rulings pertaining to those cases threatens the very structure of the federal court system. The Council is not an appellate court with a correlative power to transfer cases, and Chief Judge Buchmeyer as a district judge lacks the power of appellate review over his fellow district court judges.

Because Judge McBryde was not a litigant in either the *Satz* or *Torres* cases, the Council questions whether he has standing. Initially, we agree with Justice Harlan that this type of petition is a case or controversy in the constitutional sense. *See Chandler,* 398 U.S. at 106 n. 9, 90 S.Ct. at 1663 n. 9 (Harlan, J., concurring). Judge McBryde may not have a constitutionally protected property or liberty interest in his

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constituted, has the power to question the action of the Judicial Council of the Third Circuit.").

ability to adjudicate *Satz* and *Torres*. Nevertheless, his interest in deciding those cases free from the specter of interference, except by the ordinary process of appellate review, is one that Congress might constitutionally recognize and protect without running afoul of the limits of Article III. *Cf. Lujan v. Defenders of Wildlife,* 504 U.S. 555, 576-77, 112 S.Ct. 2130, 2145-46, 119 L.Ed.2d 351 (1992). Moreover, the damage done to Judge McBryde's reputation, which probably would be redressed in part by a finding of this court that his actions were not within the power of Chief Judge Buchmeyer or the Judicial Council to remedy, 28 U.S.C. § 332(d)(1), is also sufficient to confer standing on Judge McBryde.

The fact that the district-court phases of the *Satz* and *Torres* matters have been completed is no barrier to our review of the transfers. In both cases, Judge McBryde was considering whether to issue contempt citations. That avenue will still be open to him if we return the cases to his docket. *See* 18 U.S.C. § 401; Fed.R.Crim.P. 42(b). At this stage, we make no comment on whether contempt proceedings would be wise. It is enough to note that Judge McBryde has the authority to make the initial determination of whether the conduct of AUSA Cerow or Clerk Doherty merits his further attention.

In sum, although this court lacks jurisdiction to issue mandamus to the Judicial Council, we have jurisdiction to issue mandamus to Chief Judge Buchmeyer and the officers of the Northern District of Texas insofar as we must do so "in aid of" the appellate jurisdiction of the Fifth Circuit. 28 U.S.C. § 1651(a). This follows from our conclusion that the Council has obtained enforcement by the district court insofar as its order rested on § 332. If we were to take the view that the Council has not obtained enforcement of its order by the district court and insist on the empty exercise of an application by the Council for enforcement, Chief Judge Buchmeyer's orders would stand alone because there would be no extant order of the district court enforcing the Council's order. As we will explain, his orders are not enforceable.

IV

Chief Judge Buchmeyer purported to exercise his authority under 28 U.S.C. § 137 when he assigned *Satz* and *Torres* to himself. That section provides:

> The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.
>
> The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.
>
> If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

A plain reading of the statutory text requires us to answer two questions: First, whether there is a rule or order adopted either by the Northern District of Texas or the Judicial Council of the Fifth Circuit that governs the reassignment of cases; and, second, whether the chief judge's power to "assign the cases so far as such rules and orders do not otherwise prescribe" validates the assignment.[10]

While the parties point to no rule or order expressly governing the reassignment of cases in the Northern District of Texas, Special Order No. 3-130 provides that "civil and criminal cases in the Fort Worth Division will be assigned by random draw," with 44% of the Division's cases going to Judge McBryde.

Chief Judge Buchmeyer read Special Order No. 3-130 to govern only the initial assignment of cases in the Fort Worth Division, not their reassignment, a distinction we conclude to be too fine. In *Utah-Idaho,* the chief judge of the district reassigned several cases pending before a judge who had recently taken senior status. A litigant from one of the reassigned cases sought a mandamus from the Tenth Circuit directing the Chief Judge to reassign the case to the senior district judge. The

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[10]The Judicial Council's answer to Judge McBryde's petition for mandamus did not address the propriety of Chief Judge Buchmeyer's order.

Tenth Circuit granted the writ, but ordered the cases reassigned to the newly appointed judge who had succeeded the senior judge.

At the time *Utah-Idaho* was decided, the U.S. District Court for the District of Utah was operating under rules prescribed by the Tenth Circuit Judicial Council regarding the initial assignment of cases. Specifically, the Judicial Council's rules, much like Special Order No. 3-130 here, "required an equal and random division of civil cases and prescribed a system which balanced and apportioned the criminal, bankruptcy, immigration and naturalization cases." *Id.* at 1102. In holding invalid the chief judge's reassignment of cases, the Tenth Circuit rejected the chief judge's argument that the assignment rule did not cover the situation when an active judge takes senior status. To the contrary, the Tenth Circuit held that the chief judge's "act of choosing which cases to keep and which to assign to [the senior judge's successor] did not comply with the Council's mandate that the assignment of civil cases be equal and random, subject only to modification by written agreement of the active judges." *Id.* at 1104.

In short, the Tenth Circuit held that the initial assignment rule prohibited, by implication, the chief judge from reassigning cases already assigned to a particular judge. Special Order No. 3-130's provision for the random assignment of cases prohibits, by implication, a reassignment of those cases. It bears mention that § 137 requires that all the judges of the district agree on the "rules and orders."

A rule or order governing the reassignment of pending cases aside, Judge Buchmeyer lacked the power under § 137 to reassign *Satz* and *Torres*. Judge Buchmeyer urges that § 137 empowered him to reassign cases because Special Order No. 3-130 "does not cover the reassignment of cases -- which is done by the Chief Judge alone, not by an order signed by all of the District Judges." According to this argument, § 137 empowers the chief judge to assign cases subject only to the limits imposed by formally adopted rules and orders. Assuming for the purposes of this argument that Special Order No. 3-130 is either invalid or does not prohibit the reassignment of pending cases, Judge Buchmeyer's interpretation of § 137 seems

plausible: the second paragraph of the section empowers the Chief Judge to assign cases "so far as such rules and orders do not otherwise prescribe." *See Martinez v. Winner,* 771 F.2d 424, 434 (10th Cir.) (noting that the chief judge assigns the cases "when the rules and orders make no provision"), *modified,* 778 F.2d 553 (10th Cir.1985), *vacated,* 475 U.S. 1138, 106 S.Ct. 1787, 90 L.Ed.2d 333 (1986).

This interpretation of § 137 creates two problems. First, not one case upholds reassignment of a pending case by a chief judge without the consent of the presiding judge. To the contrary, courts have been wary of endorsing a general reassignment power. For example, in *McCuin v. Texas Power & Light Co.,* 714 F.2d 1255, 1261 (5th Cir.1983), we held that the Chief Judge of the Eastern District of Texas lacked the power under § 137 to reassign a case in which he had recused himself, even though no local rule prohibited such a reassignment. We noted that the appearance of impropriety counseled against allowing the recused judge, even the chief judge with the § 137 power to assign cases, to reassign the case.

Second and more to the point, the argument proves too much. Under the reading Judge Buchmeyer proposes, nothing prevents a chief judge from reassigning cases to himself where he disagrees with the substance of a ruling made by the presiding judge. But that power is antithetical to and incompatible with the structure of the federal judicial system.[11] "No express or implied power is granted a chief judge to affect administratively, directly or indirectly, litigation assigned to and pending before another judge of the court." *United States v. Heath,* 103 F.Supp. 1, 2 (D.Haw.1952); *see also In re Brown,* 346 F.2d 903, 910 (5th Cir.1965) ("[O]rderly procedure, of course, forbade Judge Cox to interfere with the handling of a case assigned to Judge Mize."). Although Chief Judge Buchmeyer disclaims the authority to reassign cases because of a disagreement with "how

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[11] "[T]he structure of the federal courts does not allow one judge of a district court to rule directly on the legality of another district judge's judicial acts or to deny another district judge his or her lawful jurisdiction." *Dhalluin v. McKibben,* 682 F.Supp. 1096 (D.Nev.1988).

a case was handled," his interpretation of § 137 has no such limitation.

The reassignment of *Satz* and *Torres* differs significantly from a chief judge's acknowledged power to reassign cases in situations involving the recusal, death, disability, or new appointment of a judge. In those cases, the reassignment is purely administrative, involving no review of the merits of the presiding judge's orders. *See Hvass v. Graven,* 257 F.2d 1, 5 (8th Cir.) (noting that the chief judge, who reassigned a case originally adjudicated by a judge whose temporary designation to that district had lapsed, "did not revoke his old order nor withdraw the case from Judge Mickelson and assign it to Judge Hicklin. He merely in due course as an administrative act routinely assigned the case on his docket and assigned it to the only judge, aside from himself, who then had power to exercise the jurisdiction of the court."), *cert. denied,* 358 U.S. 835, 79 S.Ct. 58, 3 L.Ed.2d 72 (1958). In this case, Chief Judge Buchmeyer's own opinion forthrightly discloses that his actions were prompted entirely by his disagreement with Judge McBryde's conduct of the two cases.

In short, § 137 provides the chief judge of a district with broad authority to assign cases; however, that authority is circumscribed by powerful limits. This particular limit lies at the core of both the statutory structure of the federal courts and Article III's command of judicial interpretation. Implicit within that grant of power is the limitation that the chief judge cannot sit as a quasi-appellate court and review the decisions of other judges in the district via his § 137 assignment power.

V

The precise limits of a judicial council's authority under § 332(d)(1) are uncertain. The Court in *Chandler v. Judicial Council of the Tenth Circuit,* 398 U.S. 74, 85 n. 6, 90 S.Ct. 1648, 1654 n. 6, 26 L.Ed.2d 100 (1970), observed that "[s]tanding alone, § 332 is not a model of clarity in terms of the scope of the judicial councils' powers." Deciding this case does not require an exact definition of the boundaries of the Council's power under § 332(d)(1). Whatever its power, the Judicial Council exceeded it here.

We investigate three questions to reach our conclusion: first, whether the Judicial Council has the authority to remedy judicial misconduct pursuant to § 332; second, if so, whether that power includes the authority to censure a judge for judicial misconduct; and third, whether the Judicial Council here censured judicial misconduct.

A

Congress created the judicial councils in 1939. *See* Pub.L. No. 76- 299, § 306, 53 Stat. 1223 (1939). Originally codified at 28 U.S.C. § 448, that legislation provided in pertinent part:

> To the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit to call at such time and place as he shall designate, but at least twice in each year, a council composed of the circuit judges for such circuit, who are hereby designated a council for that purpose, at which council the senior circuit judge shall preside.... It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts.

In 1948, Congress recodified this provision at 28 U.S.C. § 332 and revised its language. The new § 332 provided in pertinent part that "[e]ach judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." This language remained unaltered for over 30 years.

In *Chandler,* the Supreme Court confronted a challenge to a judicial council's power under § 332. The Judicial Council of the Tenth Circuit initially issued an order reassigning pending cases before Judge Chandler to other judges and prohibiting the assignment of cases to Judge Chandler in the future. The basis for the Judicial Council's order was Judge Chandler's inability to "discharge efficiently the duties of his office." The Judicial Council subsequently authorized Judge Chandler to retain cases pending before him but continued to prohibit the assignment of new cases to the judge. Judge Chandler sought a mandamus from the Supreme Court to the Judicial Council.

The Court denied the writ. It declined to exercise its jurisdiction to issue the writ where other avenues of relief were open. Judge Chandler's refusal to seek an order providing for the assignment of new cases, either via unanimous agreement with his fellow district judges or via judicial council order, persuaded the Court that Judge Chandler "has not made a case for the extraordinary relief of mandamus or prohibition." 398 U.S. at 89, 90 S.Ct. at 1657.

Concurring in the denial of the writ, Justice Harlan disagreed with the Court's jurisdictional analysis. He concluded that judicial councils possess the authority under § 332 to prohibit the assignment of cases to a judge whose conduct threatens public confidence in the judiciary. Justice Harlan noted the unquestioned authority of the judicial councils to "channel" cases to other judges when necessary. *Id.* at 121, 90 S.Ct. at 1673. Responding to Judge Chandler's argument that the Judicial Council lacked the power to reassign cases so as to "punish Judge Chandler for misbehavior," Justice Harlan wrote that there was no indication that the Council entered its order out of personal animosity. *Id.* at 122, 90 S.Ct. at 1673. Justice Harlan also disagreed with Judge Chandler that only a backlog of cases justified the Council's assignment order:

> It is true, as the legislative history ... confirms, that abatement of delays in disposition of cases was a principal purpose for creation of the Councils; but the Councils were deliberately given broad responsibilities to meet other problems as they arose. Chief Justice Groner contemplated that the Councils would cope not only with delays but also with "any other matter which is the subject of criticism, or properly could be made the subject of criticism, for which [a district judge] may be responsible."

*Id.* at 123, 90 S.Ct. at 1673. Pointing out that Judge Chandler had been a party defendant in both civil and criminal litigation and that he had been ordered to recuse himself in one case, Justice Harlan concluded that all of the circumstances, "taken as a whole, established a prima facie basis for the Council's conclusion that some action was appropriate to alleviate what the Council members perceived as a threat to public confidence in the administration of justice." *Id.* at 125, 90 S.Ct. at 1674.

The significance of Justice Harlan's discussion of the merits lies in his conclusion that § 332 authorizes judicial councils to respond to judicial conduct that threatens public confidence in the judiciary. It is true that Justice Harlan wrote only for himself and that Justices Black and Douglas vigorously disagreed with Justice Harlan on this point. *See id.* at 142, 90 S.Ct. at 1683 (Black, J., dissenting). Nonetheless, Justice Harlan's concurrence demonstrates that, at bare minimum, it is not unreasonable to view § 332 as empowering a council to remedy judicial misconduct.

B

Few decisions treat the boundaries of a judicial council's power to remedy judicial misconduct pursuant to § 332. Cases affirming a judicial council's exercise of its power under § 332 typically involve judicial council rules promulgated to alleviate judicial delay or prevent "chaos."[12] In 1978, the Ninth Circuit Judicial Council invoked its power under § 332(d)(1) and adopted the Procedures for Processing Complaints of Judicial Misconduct. *See In re Charge of Judicial Misconduct,* 593 F.2d 879 (9th Cir.1979). The Ninth Circuit observed that these rules were "designed to provide an administrative remedy for misconduct of a judge for which no judicial remedy was available." *In re Charge of Judicial Misconduct,* 595 F.2d 517, 517 (9th Cir.1979). Significantly, however, the Judicial Council points to no case censuring a judge pursuant to § 332.

Prior to 1980, the question whether a judicial council had the power under § 332 to censure a judge for judicial misconduct was open to debate. In 1980, however, Congress enacted the Judicial Councils Reform and Judicial Conduct and

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[12] *See White Motor Corp. v. Citibank, N.A.,* 704 F.2d 254, 262 (6th Cir.1983) (upholding a judicial council's promulgation pursuant to § 332 of interim bankruptcy rules "as emergency measures to prevent the collapse of the bankruptcy system" in wake of *Northern Pipeline* ); *Hilbert v. Dooling,* 476 F.2d 355, 359-60 (2d Cir.) (en banc) (upholding a judicial council's promulgation pursuant to § 332 of Prompt Disposition Rules regarding pre-trial delay in criminal cases), *cert. denied,* 414 U.S. 878, 94 S.Ct. 56, 38 L.Ed.2d 123 (1973); *see also In re Jury Plan of the Eastern District of New York,* 61 F.3d 119, 121-22 (2d Cir. Jud.C. 1995) (reviewing a proposed jury plan under § 332).

Disability Act of 1980, Pub.L. No. 96-458, 94 Stat.2035 (1980). That legislation amended § 332(d)(1) to read as it does presently. More importantly, that act added § 372(c), which creates a detailed process for the investigation and discipline of a judge whose conduct is "prejudicial to the effective and expeditious administration of the business of the courts." Section 372(c)(6)(B) enumerates the sanctions that a judicial council may impose in such circumstances and includes public and private censures or reprimands.

Judge McBryde and the Judicial Council disagree about the effect of Congress' creation of § 372(c) in 1980. According to Judge McBryde, Congress intended § 372(c) to be the sole mechanism by which judicial councils could censure judges. The Judicial Council responds that, prior to 1980, § 332 empowered it to censure as a way of remedying judicial misconduct and that Congress did not intend by enacting § 372(c) to narrow the scope of its power under § 332.

There is some support for the Judicial Council's interpretation. Well after the passage of the 1980 legislation, *Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424, 435 & n. 2, 105 S.Ct. 2757, 2763 & n. 2, 86 L.Ed.2d 340 (1985), explained that an attorney whose reputation had been egregiously injured by a district judge's decision to disqualify him "might be able to obtain relief from the Circuit Judicial Council pursuant to 28 U.S.C. § 332(d)(1)." The Court added that the judicial councils "exist 'to provide an administrative remedy for misconduct of a judge for which no judicial remedy is available.' " *Id.*

Ultimately, however, we conclude that whatever power the Judicial Council possesses under § 332 to remedy judicial misconduct, that power does not include the authority to censure or reprimand a judge for that misconduct. Stated bluntly, Congress has distinguished between remedying judicial misconduct and censuring a judge for that misconduct. By the same token, it has distinguished between transferring cases for administrative reasons and vacating judicial findings. While § 332 grants the judicial councils some authority to deal with judicial misconduct, the Judicial Council's authority to impose discipline based on its finding of misconduct is limited to that power conferred by § 372(c).

The history of the 1980 legislation confirms this reading of the statutory structure. The House Report describes the various types of actions § 332(d) authorizes the Judicial Council to take. These largely administrative functions include:

> assigning judges to congested districts, and to particular kinds of cases; developing rules for assigning judges within congested divisions having more than one federal court facility to the end that cases be tried, so far as practical, in the division in which such cases originate; directing them to assist infirm judges; ordering them to decide cases long held under advisement, requiring a judge to forego his summer vacation in order to clear his congested docket, compelling multi-judge courts to arrange staggered vacations, and setting standards of judicial ethics.

H.R.Rep. No. 1313, 96th Cong., 2d Sess. 9 (1980). The House Report referred to the proposed amendment to § 372 as containing "the core of the proposed judicial misconduct and disability legislation." *Id.* The Report added that "it was appropriate to place the increased disciplinary functions of the councils in [§ 372]." *Id.*

In short, both the legislative history and the structure of the statute suggest that the Judicial Council's power under § 332 does not include the authority to censure judges for misconduct. Indeed, § 372(c) is redundant surplusage under the Judicial Council's interpretation of § 332. On that view, a judicial council bent on censuring a judge need not call on the cumbersome procedures of § 372(c); it may invoke its power under § 332.

*Koller*'s statement that § 332 exists to remedy a docket problem even though it springs from judicial misconduct does not suggest the broader authority to censure a judge for that misconduct. The Court cited two Ninth Circuit decisions involving pre-1980 misconduct proceedings to support the proposition that § 332 empowers the judicial councils to remedy difficulties created by judicial misconduct. Those decisions, both of which dismissed the charge of judicial misconduct, did not suggest that a council has the authority under § 332 to censure a judge for misconduct. Indeed, since 1980, the Ninth Circuit appears to use § 372(c) rather than § 332 as the frame-

work for investigating charges of judicial misconduct and assessing appropriate sanctions. *See In re Charge of Judicial Misconduct,* 685 F.2d 1226, 1227 (9th Cir. Jud.C. 1982) (dismissing a § 372(c) complaint); *In re Charge of Judicial Misconduct,* Nos. 93-80015 & 93-80288 (9th Cir. Jud.C. 1994) (attached to Judicial Council's brief). We con-clude that the Judicial Council lacks the power under § 332(d) to censure a judge for judicial misconduct.

C

We have no doubt that by any objective measure the Judicial Council's reassignment of *Satz* and *Torres,* accompanied by the vacating of Judge McBryde's findings and the entry of starkly contrary findings, was a strong censure of Judge McBryde for his conduct in those cases. The Council's decision regarding his "conduct" required a judgment as to whether his understanding of the facts should prevail. The Judicial Council lacks the power to censure a judge under § 332, nor may it order a case reassigned based on its disagreement with the district judge's factual findings. *See United States v. Washington,* 98 F.3d 1159, 1165 n. 1 (9th Cir.1996) (Kozinski, J., concurring) ("[O]ur judicial council has stated repeatedly that it may not address any matter that concerns the merits of a case and might be raised through normal channels of appellate review."), *petition for cert. filed,* 65 U.S.L.W. 3713 (U.S. Apr. 7, 1997) (No. 96-1607).

The power to reassign pending cases is an extraordinary one. Courts of appeals may reassign a case pursuant to 28 U.S.C. § 2106 as part of a remand order, though that remedy is rarely invoked. *See, e.g., United States v. Microsoft Corp.,* 56 F.3d 1448, 1463 (D.C.Cir.1995) (per curiam). In contrast, 28 U.S.C. § 372(c)(6)(B)(iv) does not expressly empower a judicial council to reassign *pending* cases; rather, it only authorizes a judicial council, upon a finding of judicial misconduct pursuant to that section, to order "on a temporary basis for a time certain, no *further* cases be assigned" to the disciplined judge (emphasis added).

We have found no case--and the Judicial Council has not pointed us to one--upholding the power of a judicial council to reassign pending cases as a reprimand for judicial misconduct.

In *Chandler,* the Judicial Council initially ordered the reassignment of pending cases but later modified its order to permit Judge Chandler to continue hearing cases already before him. Indeed, such a power would pose constitutional questions regarding the exclusivity of congressional power to remove a sitting federal judge. *See In re Matter of Certain Complaints Under Investigation,* 783 F.2d 1488, 1510 (11th Cir.) (reserving the question of the constitutionality of a judicial council's power to forbid further assignment of cases to a judge on a temporary basis for a time certain), *cert. denied,* 477 U.S. 904, 106 S.Ct. 3273, 91 L.Ed.2d 563 (1986).

Concluding that a judicial council may not censure a judge by reassigning pending cases pursuant to § 332(d) does not mean that the Judicial Council lacks the authority under § 332 to reassign cases for administrative reasons. In *Jimenez v. Aristeguieta,* 311 F.2d 547 (5th Cir.1962), *cert. denied,* 373 U.S. 914, 83 S.Ct. 1302, 10 L.Ed.2d 415 (1963), we upheld the authority of the Judicial Council to reassign a pending extradition proceeding to another judge. In that case, Venezuela sought the extradition of its former president, Marcos Gamines. Judge Mathes of the U.S. District Court for the Southern District of California, who was sitting by designation in Miami, issued an arrest warrant for Gamines. Judge Mathes' assignment to the Southern District of Florida evidently lapsed during the extradition proceedings, and the Judicial Council for the Fifth Circuit ordered the reassignment "to some other judge" of any "unfinished business" of Judge Mathes. Chief Judge Whitehurst subsequently ordered the reassignment of Gamines' case to himself. Chief Judge Whitehurst ordered Gamines confined pending extradition by the Secretary of State. Gamines sought a writ of habeas corpus and argued, *inter alia,* that the reassignment was invalid because Chief Judge Whitehurst did not have jurisdiction to enter the order of commitment.

We disagreed. Citing the Judicial Council's power under § 332, we concluded that "[t]his extradition proceeding was 'the business of the courts' and Judge Whitehurst's assignment to hear the evidence of criminality under the order of the Judicial Council of the Fifth Circuit and Chief Judge Whitehurst's order was a proper exercise of their authority." *Id.* at 554. Signifi-

cantly, however, we noted that "[t]he reassignment did not constitute any attempt to review any action of Judge Mathes as extradition magistrate." *Id.*

Had the Council proceeded under § 372(c)(3), it would have been confronted by the reality that the complaint of judicial misconduct was "directly related to the merits of a decision or procedural ruling." In *In re Charge of Judicial Misconduct,* 685 F.2d 1226, 1227 (9th Cir. Jud.C. 1982), a judicial council dismissed a complaint filed under § 372(c) because the statute required the dismissal of "complaints of judicial misconduct which in substance are simply objections to substantive or procedural error." The Council observed that "[e]ven if there were multiple legal errors in the handling of this case, ... such matters were entirely cognizable in the ordinary course of appellate review." *Id.*[13] *See also In re Charge of Judicial Misconduct,* 613 F.2d 768, 769-70 (9th Cir.1980) (dismissing complaint).

This limit, which is expressed within § 372(c), is implicit with § 332(d)(1). Stated another way, it would make no sense for Congress to prohibit a judicial council from reviewing the merits of an individual judge's conduct pursuant to § 372(c) but permit that same review pursuant to § 332(d). Indeed, even when the Ninth Circuit was operating under its Procedures for Processing Complaints of Judicial Misconduct, which were promulgated pursuant to § 332(d), it did not understand those procedures as empowering a judicial council "to pass upon allegations relative to a judge's disposition of a particular piece of litigation, absent any suggestion of corruption or other impropriety or any indication of a broader pattern of conduct evidencing incapacity, arbitrariness, or neglect of office." *In re Charge of Judicial Misconduct,* 593 F.2d at 881.

The argument that the 1980 amendments to § 372 effectively eliminated the power of judicial councils to address judicial misconduct under § 332 is powerful. Remedying

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[13]The Council did, however, hold out the possibility of an "exceptional case developing where the nature and extent of the legal errors are so egregious that an inference of judicial misconduct might arise, but that would be a rare case, and it has not occurred here." 685 F.2d at 1227.

judicial misconduct will ordinarily amount to a censure. We need not decide, however, at what point findings of misconduct supporting a remedy of transferring cases become a censure of the judge beyond the authority granted by § 332. At the least, that authority does not extend to findings of misconduct that require the invalidation of factual findings made by an Article III judge in a case pending before him and over which he has jurisdiction.

We do not suggest that the Judicial Council set out to review the merits of Judge McBryde's decision. There is no question but that the Council responded to what it perceived to be improper and abusive acts by a trial judge. Significantly, the line between the merits of a decision and the judge's conduct in reaching the decision is not always easily found. *Compare In re Charge of Judicial Misconduct,* No. 93-80015 (9th Cir. Jud. C. 1994) (sanctioning a judge for making intemperate and abusive remarks from the bench) *with Petition of Lauer,* 788 F.2d 135 (8th Cir. Jud.C. 1985). In the latter case, the Eighth Circuit Judicial Council dismissed a charge of judicial misconduct brought under § 372(c). The complaint charged that a district judge made inappropriate remarks during the sentencing of several defendants. In comments equally applicable to this case, Chief Judge Lay observed:

> The Judicial Conduct and Disability Act should not be invoked so as to chill the independence of a trial judge in a judicial proceeding. A trial judge should not fear that because of comments he or she makes from the bench, which in good faith the judge feels are related to the proceeding before the court, he or she ultimately may be subject to a disciplinary sanction by the Judicial Council. Disenchanted litigants or other citizens should not be able to attempt to influence a federal judge about a judicial decision through the threat of disciplinary sanction. This is clearly not what Congress intended in passing the Act.

*Id.* at 138.

VI

We conclude that Chief Judge Buchmeyer's and the Judicial Council's orders were not limited to providing a remedy for misconduct because they rested on the invalidation of

judicial findings in a pending case and constituted a censure of the judge. We grant the petition for a writ of mandamus on this ground and vacate the reassignment orders. The cases will be returned to Judge McBryde's docket. Whether, in light of the events here described and the misunderstandings of which they are a part, he wishes to retain the cases or recuse is left in the first instance to his judgment as an Article III judge. We do not reach the additional claim that the Judicial Council violated Judge McBryde's Fifth Amendment right to due process.

The petition for mandamus is GRANTED.

EMILIO M. GARZA, Circuit Judge, specially concurring:

I concur in Judge Higginbotham's excellent opinion, but would not reach the issues in Part III.A.

DENNIS, Circuit Judge, specially concurring:

I respectfully concur in the essential elements and result of the majority opinion.

Because we do not have appellate jurisdiction to review an order of the Judicial Council, as the majority observes, the question of whether we can issue a writ to the Judicial Council in aid of such non-existent jurisdiction seems to answer itself. However, because it is not necessary to consider the question in the present case, I do not join in Part III A of the majority opinion devoted to an inconclusive and, I believe, unprofitable discussion of the subject.

Due to the fact that Chief Judge Buchmeyer's orders clearly lie within our appellate jurisdiction, we may issue writs to the district court in aid of that jurisdiction, unless the Judicial Council's order constitutes a valid administrative or disciplinary order that subsumed and removed the subject matter of Chief Judge Buchmeyer's orders from our appellate jurisdiction. For essentially the same reasons assigned by the majority, I conclude that the Judicial Council's order was not a product of actions confined to matters within its delegated administrative or disciplinary authority but extended to matters that bear directly on the decision of individual cases. Consequently, the

Judicial Council order was ineffective as a valid administrative or disciplinary order and was not capable of removing Chief Judge Buchmeyer's orders from our appellate jurisdiction.

As the majority opinion makes clear in Part III B and succeeding parts, Chief Judge Buchmeyer exceeded the lawful exercise of his prescribed jurisdiction in taking the cases from Judge McBryde and reassigning them to himself. Accordingly, I join in the majority's decree insofar as it grants a writ of mandamus to the district court, vacates that court's reassignment orders, and returns the cases to Judge McBryde's docket.

No. 01-1778 (4)

Supreme Court, U.S.
FILED
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 2001

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THE HONORABLE JOHN MCBRYDE,

*Petitioner*,

v.

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.,

*Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## Counter-Statement Regarding Questions Presented

Petitioner presents four questions for the Court's consideration. Questions 2 and 4 assume that Petitioner was sanctioned under the Judicial Conduct and Disability Act of 1980 (the "Act") based on the merits of his substantive and procedural rulings. As set forth in the Counter-Statement of the Case, that assumption is not only inaccurate, but each and every one of the administrative bodies (all comprised of Article III judges) empowered and obligated under the Act in these proceedings, as well as the District Court below, has determined to the contrary. (Pet. App. 89a-96a, 143a-49a, 159a-60a.) The Court of Appeals did not reach the question, but, as is evident from both the majority and dissenting opinions in the Court of Appeals, all three members of the panel were of the view that Petitioner's conduct, at least in certain instances, was abusive and properly sanctionable under the Act. (Pet. App. 22a-24a, 28a, 45a.) Similarly, Petitioner's Question 4 assumes that the Judicial Council and the Judicial Conference exceeded the authority granted them on the face of the Act. They did not, as both the District Court and the Court of Appeals determined. (Pet. App. 16a-17a, 54a, 88a-96a.)

**Statement Pursuant to Supreme Court Rule 14.1(b)**

Respondents adopt Petitioner's Rule 14.1(b) statement.

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents are the Judicial Council of the Fifth Judicial Circuit (the "Council"), the Review Committee of the Judicial Conference (the "Judicial Conference" or the "Review Committee"), and the Honorable William J. Bauer (Chairman of the Review Committee).[1] Respondents do not dispute that Petitioner, the Honorable John McBryde, rhetorically invokes many important principles. In particular, Respondents – an Article III judge and two administrative bodies comprised of 23 additional Article III judges – are, on a daily basis, acutely conscious of the importance of judicial independence to each Article III judge and to the entire Judicial Branch. At the same time, Respondents are charged by Congress with the duty and responsibility to administer the Judicial Conduct and Disability Act of 1980, legislation which Congress crafted and, at the urging of the Judicial Branch, entrusted to the Judicial Branch to administer. As important as the concepts that Petitioner invokes are to every Article III judge, those concepts would not be meaningfully elucidated by review of the decision below, and Respondents respectfully submit that, based on the standards articulated by the Court that inform the discretionary grant of certiorari, the Petition should be denied.

### Counter-Statement of the Case

Petitioner attempts to raise questions about the constitutionality of the Act. To explain and, Respondents hope, to defuse the use of characterization, by the terms "sanction" or "discipline" (Petitioner uses the term "punishment") Respondents mean the imposition of some consequence other than impeachment for improper conduct or behavior. This Court last addressed questions of discipline of Article III judges 32 years ago, and has never addressed the Act. A brief review of the historical and statutory context is necessary for this Court's

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[1] Honorable Henry A. Politz, former chief judge of the Fifth Circuit, was an appellee below but died prior to the filing of the Petition.

consideration of whether review of this case is appropriate.

### A. Statutory Framework

The procedures embodied in the Act that were employed in the proceedings against Petitioner were developed over a long period of years to address the ever-increasing concerns as to the need for judicial council oversight authority with respect to the conduct of judges. The issues raised by Petitioner were carefully considered and rejected by Congress in the interests of developing a practically administrable system of addressing improper judicial conduct.

#### 1. Origins of the Act

At the urging of Chief Justice Hughes and other prominent jurists, in 1939 Congress created judicial councils for each circuit (then composed only of judges from courts of appeals) and empowered judicial councils to "make all necessary orders for the effective and expeditious administration of the business of the courts" in each circuit. *See* 28 U.S.C. § 332(d)(1); *see also* Administrative Office Act of 1939, Pub. Law No. 76-299, 53 Stat. 1223 (1939 version of legislation). It was not considered necessary for this legislation to contain an explicit textual provision authorizing judicial councils to impose sanctions or even enforcement mechanisms (*e.g.*, contempt or subpoena power).[2] The authority of circuit judicial councils under Section 332 was thought to be broad and to extend to taking action to "avoid[] any stigma, disrepute, or other element of

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[2] When this omission was noted by Representatives Cellar and Chandler at the hearing on the bill, Hon. D. Lawrence Groner, Chief Justice of the Court of Appeals for the District of Columbia, commented in language and perspective that may sound quaint today, that he could not conceive that any judge, "when he is admonished by this council of judges that he must do in accordance with the report made to him a particular thing to correct what is regarded as an abuse, . . . will fail to do it." *Hearings on H.R. 2973, H.R. 5999 Before the Committee on the Judiciary of the House of Representatives*, 76th Cong., 1st Sess., at 14 (March 2 & April 15, 1939).

loss of public esteem and confidence in respect to the court system, from the action of a judge or other person attached to the courts." Report of the Proceedings of the Judicial Conference of the United States, 51 (1961). This Court's decision in *Chandler v. Judicial Council*, 398 U.S. 74 (1970), focused attention on the ability of circuit judicial councils to discipline a judge who refused to comply with a council order. In that case, ultimately dismissed on exhaustion grounds, this Court nevertheless endorsed the authority and ability, under Section 332, of circuit councils to take action – sanctions or discipline – to obtain compliance with their orders. In doing so, this Court rejected what can be called an absolutist view of judicial independence set forth in the dissent of Justice Black, joined by Justice Douglas, which would prohibit the imposition of any consequences on any Article III judge short of impeachment.

In the decade following *Chandler* Congress enacted a series of laws directed at disclosure and reporting by, and accountability of, persons holding positions in the Executive, Legislative, and Judicial Branches. In this context, Congress considered a number of bills that would have supplemented Section 332 by establishing specific judicial discipline procedures and sanctions — including provisions for the removal of Article III judges. These bills faced opposition — on the ground that the Impeachment Clause of the Constitution provides the sole means of removing a federal judge — and were not adopted. *See generally* Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. Pa. L. Rev. 283, 291-92 (1982).

After much consideration and debate concerning the proper structure and scope of legislation, Congress adopted the Act in 1980. *See* Pub. Law No. 96-458, 94 Stat. 2035 (1980). This legislation left responsibility for the investigation of conduct of judges and other personnel within the Judicial Branch and for the imposition of legislatively defined consequences primarily with the existing circuit judicial councils. Several key points

emerge from a review of the legislative history of the Act.

First, following resignations first of a Vice President and then of a President, Congress enacted various legislation as part of a broad effort through reporting, disclosure, and other requirements to improve the accountability of, and public confidence in, members of all three Branches of Government. The Act was part of that effort.[3]

Second, the Act created detailed provisions for the investigation of judicial conduct and the specific authorization of consequences for misconduct, which were new, and for the investigation and determination of the possibility that a federal judge may have become disabled, which were issues Congress had entrusted for more than 200 years to federal judges.[4]

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[3] *See, e.g., Judicial Discipline and Tenure: Hearings Before the Subcommittee on Judicial Machinery and Constitution of the Senate Committee on the Judiciary*, 96th Cong., 1st Sess. 71 (1979); *Judicial Discipline and Tenure: Hearings Before the Subcommittee on Court, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 96th Cong., 1st & 2d Sess. 130 (1980) (hereinafter "*House Hearings*") (statement of Rep. Rodino).

[4] Some of the Section 372(c) proceeding involving Petitioner included an investigation of possible mental disability. (Pet. App. 167a-69a.) The Petition refers to such inquiries in ways which might be read to suggest impropriety. Congress has long provided a mechanism, short of impeachment, to address issues of mental and physical disability of federal judges, and entrusted the administration thereof to Article III judges. In 1801, legislation provided that upon "satisfactory evidence" of "the inability of the district judge . . . to perform the duties of his office," the "circuit court" "shall" direct a circuit court judge to perform the district judge's duties "for and during the period the inability of the district judge shall continue." Act of Feb. 13, 1801, ch.4, § 25, 2 Stat. 89, 97. In 1809, Congress created a system wherein the federal marshal or district attorney could submit evidence of a district judge's disability to the appropriate Supreme Court justice; if the district judge was determined disabled he was relieved of duties for the period of disability. Act of March 2, 1809, ch. 27, 2 Stat. 534. In 1850, Congress enacted legislation which remained in place for almost 70 years, providing for certification of the disability of a district judge by the clerk of the court to the circuit judge and the designation by the circuit judge of

Third, in drafting and revising the Act, Congress "inquired with great care into any possible constitutional objections to the proposed legislation." H.R. Rep. No. 96-1313, 96th Cong., 2d Sess. 17 (1980); *see also* H.R. Rep. No. 101-512, 101st Cong., 2d Sess. 10 (1990). The House Judiciary Committee heard extensive testimony on the constitutionality of the Act, *see, e.g.*, *House Hearings*, *supra* note 3, at 20-21, 30-38, 82-83, 93, 130-33, 137-39, 153-56, 169, 174-76, 180-81, and reviewed a study prepared by the Library of Congress analyzing the constitutionality of the Senate bill. *See Constitutional Issues Raised by the Proposed Judicial Conduct and Disability Act of 1979* (American L. Div., Oct. 24, 1979), *reprinted in House Hearings*, *supra* note 3, at 697. The Senate also analyzed this issue at length. *See* 125 Cong. Rec. S15389-93, S1412 (daily ed. Oct. 30, 1979). Both House and Senate leaders agreed that the legislation was crafted "to maintain the independence and autonomy of the judicial branch of government." H.R. Rep. No. 96-1313, *supra*, at 1; 126 Cong. Rec. S13,858 (daily ed. Sept. 30, 1980) (remarks of Sen. DeConcini).[5]

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substitutes during the period of disability. Act of July 29, 1850, ch. 30, 9 Stat. 442. In 1919, Congress altered the system for dealing with judicial disability and enacted legislation which authorized the President to certify that a federal judge was disabled and to appoint (with the advice and consent of the Senate) a new judge. Act of Feb. 25, 1919, ch. 29, sec. 6, § 260, 40 Stat. 1156, 1158. The current Section 372(b) of Title 28, enacted in 1957 (and not substantively modified since then), authorizes the President, upon the certification of a majority of a judicial council that a judge is permanently mentally or physically disabled, to appoint (with Senate confirmation) a new judge.

[5] As a result of its oversight activity, Congress passed the Judicial Improvements Act of 1990, Pub. Law No. 101-650, 104 Stat. 5089 (1990), which, *inter alia*, made certain minor changes to the Act and granted circuit councils the power to institute contempt proceedings in order to enforce their orders. *See* 28 U.S.C. § 332(d)(2).

### 2. The Provisions of the Act

The Act sets forth the process by which a circuit judicial council may address complaints that a federal judge has engaged in "conduct prejudicial to the effective and expeditious administration of the business of the courts" or is "unable to discharge all the duties of office by reason of mental or physical disability." 28 U.S.C. § 372(c)(1).

"Any person" may file a complaint under Section 372(c)(1). Upon receipt of such a complaint, the Clerk transmits the complaint to the chief judge of the circuit and to the subject of the complaint. 28 U.S.C. § 372(c)(2). The chief judge reviews the complaint, § 372(c)(3), and then either dismisses it, § 372(c)(3)(A) & (B), or appoints a special committee (required to be composed of the circuit chief judge and equal numbers of circuit and district judges from the circuit) to investigate. § 372(c)(4)(A).

When a chief judge determines that an inquiry is warranted, the special committee is authorized to conduct an investigation "as extensive as [the special committee] considers necessary," § 372(c)(5), with full subpoena powers. § 372(c)(9)(A). Judicial councils are authorized to adopt rules of procedure. § 372(c)(11). An investigation culminates with a "comprehensive written report" submitted to the judicial council, setting forth both the findings of the investigation and recommendations for necessary and appropriate action by the judicial council. § 372(c)(5). A judicial council is statutorily authorized, *inter alia*, to take various prescribed kinds of disciplinary action. § 372(c)(6)(B)(i)-(vii).

After a judicial council issues an order pursuant to Section 372(c)(6), a complainant, judge, or magistrate "aggrieved by [the] action of the judicial council under [Section 372(c)(6)] may petition the Judicial Conference of the United States for review thereof." 28 U.S.C. § 372(c)(10). Section 372(c)(10) further provides that after review by the Judicial Conference

"all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise."

### B. The Proceedings Under the Act

#### 1. The Investigation by the Special Committee

This case arises out of an investigation of complaints of judicial misconduct concerning Petitioner conducted by the Judicial Council under the Act. On September 13, 1995, the late Henry A. Politz, then Chief Judge of the Fifth Circuit, appointed a special committee (the "Special Committee"), with directions to investigate and report on complaints of judicial misconduct against Petitioner. Three additional complaints relating to Petitioner were subsequently referred to the Special Committee. During its investigation of the complaints, the Special Committee also became aware of additional incidents and patterns of conduct concerning Petitioner, and so expanded the scope of its investigation as authorized by the Fifth Circuit's Complaint Rule 9(A) adopted pursuant to the authorization set forth in Sections 372(c)(5) and (c)(11).

Evidentiary hearings did not commence for almost two years for reasons and due to proceedings explained in the Report. (Pet. App.167a-72a.) Petitioner was given notice of the expanded investigation and the issues to be raised at the hearings. In August, September, and October 1997, the Special Committee held nine days of evidentiary hearings, during which fifty-five witnesses testified. The Special Committee also received in evidence court transcripts and other documentary exhibits. The description of the investigation and the findings and recommendations of the Special Committee are contained in a detailed, 159-page report by the Special Committee (Pet. App. 163a-301a) (the "Report").

After a brief background explanation of the origin of the investigation (Pet. App.166a-73a), the Special Committee

details in the Report findings of fact with respect to twenty-two separate instances from 1991 to 1997 of Petitioner's conduct with officials, practitioners, prosecutors, public defenders, federal judges, a state judge, and the clerk of the court. (Pet. App. 173a-274a.) The Special Committee found that Petitioner had engaged in a serious and ongoing pattern of misconduct prejudicial to the effective administration of justice and the business of the courts, including a pattern of abusive and intemperate behavior, which had brought disrepute upon, and created discord within, the federal judiciary, and also had a chilling impact on the legal community in the Northern District of Texas. (Pet. App. 285a-86a.) The Special Committee found that witnesses who were subpoenaed in the course of its investigation faced a "well-grounded apprehension that Petitioner might retaliate against those persons who testified." (Pet. App. 288a.) This conclusion was based upon a review of actual incidents of retribution by Judge McBryde, the reticence of those who had experiences even to discuss these incidents with the Special Committee, and upon a specific incident during the proceeding that a person could conclude was an attempt by Petitioner to harass or retaliate against a witness.

**2. Order of the Council**

The Council issued an order (the "Council's Order") pursuant to Section 372(c)(6), which adopted three remedial measures relating to Petitioner's improper conduct. In Section 1 of the Council's Order, the Council adopted a public reprimand of Petitioner for conduct prejudicial to the administration of justice and inconsistent with Canon 2(A) and Canon 3(A)(3) of the Code of Judicial Conduct. (Pet. App. 159a-60a.)

In Section 2, the Council, pursuant to Section 372(c)(6)(B)(iv), ordered that no new cases be assigned to Petitioner for a one-year period following the effective date of the Council's Order. (Pet. App. 160a.)

In Section 3, the Council prohibited Petitioner for a three-

year period from participating in cases involving certain attorneys who received subpoenas from the Special Committee. (Pet. App. 160a.) This case reassignment provision, pursuant to Section 372(c)(6)(B)(vii), was based on the finding that a likelihood of retaliatory conduct by Petitioner against witnesses called to testify during the proceedings was substantial. (Pet. App. 288a-91a.)

### 3. Review by the Review Committee

On March 16, 1998, Petitioner filed seven petitions for review with the Review Committee of the Judicial Conference, which was comprised of three circuit court of appeals judges and two district court judges. On September 18, 1998, the Review Committee issued its unanimous opinion and order, rejecting each of Petitioner's objections. (Pet. App. 125a-58a.)

With respect to the decision to expand the scope of the investigation beyond the complaints, the Committee held that such expansion was specifically authorized by the Fifth Circuit's Complaint Rules (Pet. App.132a-33a); that such expansion was consistent with the Act (Pet. App. 133a-35a); and indeed that such expansion was "affirmatively desirable" in situations where there appears to be evidence of a pattern of objectionable conduct. (Pet. App. 135a.)

The Review Committee rejected Petitioner's assertion that he was being sanctioned for conduct directly related to the merits of his decisions and procedural rulings. The Review Committee found that the Council's sanctions did not arise from disagreements with the merits of his rulings, but rather out of findings that he engaged in a consistent pattern of abusive conduct. (Pet. App. 143a-49a.) The fact that the evidence of this abuse was largely revealed in the judge's rulings, statements and conduct on the bench did not shield it from investigation and sanction. (*Id.*) The Review Committee found this determination supported by its prior decisions. (Pet. App. 144a-46a.) The Review Committee specifically affirmed the factual

findings underlying the Council's Order.

Finally, reaching the sanctions imposed by the Council's Order, the Review Committee affirmed the Council's public reprimand sanction (Section 1) and the directive that certain cases be reassigned from Petitioner because of the potential for retaliation against certain witnesses in these proceedings (Section 3). (Pet. App. 149a-150a, 155a-158a.) With respect to the one-year suspension of new case assignments (Section 2), the Review Committee found that such a suspension was justified as a remedial measure, but not as a punitive one. Because the Council intended the suspension of new case assignments to serve a very substantial remedial purpose, the Review Committee affirmed the one-year suspension with the proviso that the suspension would be terminated short of a year should Petitioner demonstrate that "he has seized the opportunity for self-appraisal and deep reflection in good faith and that he has made substantial progress toward improving his conduct." (Pet. App. 154a.)

### C. The District Court's Decision

On October 15, 1998, Petitioner filed a Complaint for Declaratory, Injunctive, and Mandamus Relief against Respondents (the "Complaint"). The Complaint asserted eight counts, challenging the Council's Order and Review Committee's decision on constitutional grounds, challenging the factual findings upon which the Council's Order is based, and seeking a declaratory judgment (i) that the Act, pursuant to which the Council's Order and the Review Committee decision were issued, is unconstitutional on its face and, in the alternative, that the statute is unconstitutional as applied to him; and (ii) that the Council's Order and the Review Committee decision are unlawful under the Act and the Complaint Rules. The United States was granted leave to intervene to defend the facial constitutionality of the Act.

On December 30, 1999, the District Court entered judgment,

dismissing most of the Complaint.[6] The District Court determined that the Act does not usurp or encroach upon the power of impeachment that resides with the Legislative Branch, nor does it jeopardize judicial independence, which stands to be enhanced by judicial self-monitoring. (Pet. App. 54a.) Rather than authorizing review of the merits of a judge's legal decisions, the Act authorizes review of a judge's "alarming or destructive pattern of conduct" and therefore does not threaten the Article III function. (*Id.*) The District Court also rejected Petitioner's contentions that Respondents exceeded their authority under Act and applied the Act unconstitutionally to Petitioner. The District Court concluded that Respondents "confined their investigation to a pattern of behavior towards attorneys and others, which they found demonstrates intemperance and abusiveness" and that "the sanctions levied against Judge McBryde did not transgress into the forbidden realm of impeachment, but rather were limited in scope and tailored to the problem that his behavior posed." (*Id.*) The District Court held that the Review Committee's upholding of the sanctions against Petitioner and its rejection of Petitioner's argument that he was sanctioned based on disagreement with the merits of his rulings "reflect[ed] deep respect for the important distinction between the merits of a judicial decision and the conduct of the judge rendering that decision." (Pet. App. 91a.)

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[6] Count 8 of the complaint alleged that the confidentiality provision of the Act, 28 U.S.C. § 372(c)(14), on its face and as applied, violated the First Amendment. Respondents said from the outset that they had no objection to the public release of virtually the entire record, but for certain individual privacy and institutional reasons wished to keep confidential a certain narrow category of information about individuals and the psychiatric aspect of the investigation. The District Court determined that, as applied to Petitioner at that stage of the proceedings, any restriction on the public dissemination of the underlying record violated the First Amendment. (Pet. App. 120a.) Respondents did not appeal.

### D. Decision of the Court of Appeals

On September 21, 2001, the Court of Appeals affirmed in part and vacated in part. The Court of Appeals determined that to the extent Petitioner's claims distinctively related to the one-year suspension of new case assignments and the three-year disqualification sanction, they were moot. (Pet. App. 3a.) With respect to Petitioner's as applied constitutional challenges (based on separation of powers, judicial independence and due process) and his statutory claims, the Court of Appeals determined that the review preclusion provision of the Act barred review. (Pet. App. 15a-17a.) Accordingly, the Court of Appeals did not reach the merits of Petitioner's challenge to the District Court's rejection of his as applied constitutional claims. The Court of Appeals, however, did reach and unanimously rejected Petitioner's remaining facial constitutional challenges on the merits. (Pet. App. 17a-24a.)

One member of the panel dissented from the determination that the review preclusion provision of the Act (28 U.S.C. § 372(c)(10)) barred review of Petitioner's as applied constitutional claims. The dissent concluded that one of Petitioner's three "as applied" claims – namely, that the Act as applied to Petitioner violated judicial independence – had merit. The dissent reasoned that some of the instances catalogued in the Report were in its view sufficiently egregious by themselves to warrant rejecting Petitioner's as applied claims: "Had the Council restricted its report to incidents like these, I would have no trouble rejecting [Petitioner's] as-applied challenge, for no reasonable judge would think behavior like this appropriate." (Pet. App. 45a (Tatel, J., dissenting).) But, because other of the instances seemed, to the dissenter, to be less egregious or not egregious at all, the dissent concluded that their inclusion in the report risked "chilling legitimate conduct by other judges." (*Id.* 46a.) Accordingly, the dissent urged that Article III judges should not be disciplined under the Act unless their conduct is

"clearly abusive" of judicial power. (*Id.* 42a-44a.)[7]

### E. The Petition Mischaracterizes the Findings and Conclusions of the Special Committee and Council

The Petition presents a distorted version of the findings and conclusions of the Special Committee and the Council, suggesting that the findings of "arbitrary", "abusive", and "intimidating" conduct by Petitioner were based on trivialities, such as the prohibition on newspapers in his courtroom or the requirement that parties and witnesses wear jackets and ties in jury trials (Pet. 7). As the Report itself reflects, that is not true. The Report never mentions such rulings as a basis for the Special Committee's findings. To the contrary, as was recognized by the District Court below, the disciplinary proceedings against Petitioner based on the incidents described in the Report evidenced that he was a jurist "plagued by intemperance, abusiveness, and profound lack of collegiality" (Pet. App. 90a) and that his "pattern of conduct" raises "profound concerns regarding not only the Fort Worth legal community, but also the American legal profession more generally." (Pet. App. 95a.)

Respondents respectfully refer the Court to the Report (Pet. App. 163a-301a), as well as the District Court's summary of several of the incidents supporting the Council's findings of

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[7] The dissent did not explain the statutory or constitutional analytical steps that led to the "clearly abusive" legal conclusion articulated and therefore raises more difficult questions than it purports to answer. The dissent does not explain how the language of the Act, which all panel members agreed is constitutional on its face and which authorizes discipline if a federal judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts," 28 U.S.C. § 372(c)(1) – the identical standard of Section 332 in existence since 1939 and involved in *Chandler* – is construed or found to contain a "clear abuse of judicial power" limitation so that it can be both facially constitutional and unconstitutional as applied. Nor does the dissent explain the source or the scope of this non-textual constitutional limitation on Congress's power to enact necessary and proper legislation with respect to the inferior courts it creates and funds.

patterns of abusive conduct (Pet. App. 60a-67a). The District Court's decision echoes the Review Committee's determination, based on a review of the record, that there was an "impressive mound of evidence that [Petitioner] has frightened and intimidated a significant portion of the local bar" and that the evidence was "more than sufficient to support the judicial council's findings [of patterns of intemperate, abusive and intimidating conduct]." (Pet. App. 148a-49a.) These findings and the underlying record stand in sharp contrast to the version of the evidence, the record, and the findings presented in the Petition.

## REASONS FOR DENYING THE WRIT

The Petition should be denied because there is no conflict among any courts of appeal with respect to any issue presented in the Petition. Indeed, to the extent any court of appeals, in addition to the court below, has addressed any of the issues presented, it is in accord with the court below, and all of Petitioner's arguments are without merit. Moreover, the asserted errors do not involve a misstatement of any rule of law, but only asserted misapplications of properly stated rules of law to a complex and lengthy factual record of conduct by Petitioner reviewed by the Council and the Review Committee. Such asserted errors, even were they established (which they are not as set forth below), are not grounds to warrant discretionary review by the Court. The underlying basis for the Petition is Petitioner's assertion that the factual findings and procedural determinations of the Special Committee, the Council, and the Review Committee were erroneous and unsupportable. Such fact-laden arguments likewise do not warrant the grant of the Petition, particularly in light of the Act's finality provision.

## I. The Determination of the Court of Appeals That Section 372(c)(10) of the Act Precludes Judicial Consideration of As Applied Constitutional Claims Does Not Conflict with Decisions of This Court, Is the Uniform Holding of Every Circuit That Has Addressed the Issue, and Presents No Question Warranting Review by This Court

The Court of Appeals' determination that 28 U.S.C. § 372(c)(10) precludes as applied constitutional challenges of the Act does not present an issue meriting review by this Court. As shown below, what Petitioner characterizes as a conflict is not that, but his disagreement with interpretation of the legislative history and Congressional intent underlying the Act.

The decision below does not conflict with decisions of the Court. No matter how strongly Petitioner attempts to characterize the presumption articulated by this Court, that "[w]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear," (Pet. App. 9a) (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)), Petitioner cannot dispute that the Court of Appeals applied that presumption in analyzing the language and legislative history of the Act. The Court of Appeals recognized that only "clear and convincing" evidence of congressional intent to preclude would satisfy the "especially high hurdle" a claim of preclusion faces when the Constitution is invoked, both for facial and as applied constitutional challenges to the Act. (Pet. App. 9a-10a.) The Court of Appeals analyzed the legislative history surrounding Section 372(c)(10), and the purposes of the Act's provisions establishing that all the initial, determinative, and review proceedings were conducted by Article III judges, and determined that the "requisite clarity of preclusive intent" existed. That application of *Webster* does not amount to a conflict with controlling precedents of this Court.

Nor is there any conflict among the Circuits. The Third

Circuit has held that the Act's finality provision bars as applied constitutional claims. *See Cunningham v. Becker*, 275 F.3d 34 (3d Cir. 2001) (affirming district court holding that Section 372(c)(10) denied courts "jurisdiction to consider challenges to the decisions by the Chief Judge or the Judicial Council except to the extent the complaint challenges the constitutionality of the statute itself (as opposed to the constitutionality of the statute as applied)") (unpublished opinion *affirming Cunningham v. Becker*, 96 F. Supp. 2d 369, 373 (D. Del. 2000)).[8] And, a fair reading of a decision Petitioner does point to, albeit incorrectly, *In re McBryde*, 117 F.3d 208 (5th Cir. 1997) (*McBryde I*) (Pet. App. 315a-358a), shows that the Fifth Circuit has determined that Congress clearly intended to withdraw jurisdiction regarding constitutional claims through the Act's finality provision. *Id.* at 222 (Pet. App. 340a-41a.) There, similar to the "as applied" claim by Petitioner in this case, Petitioner asserted, *inter alia*, that the Council's treatment of him under 28 U.S.C. § 332 violated his right to judicial independence. Quoting the same language from *Webster*, the Fifth Circuit determined that, unlike 28 U.S.C. § 332, the Act's finality provision "withdraws jurisdiction to consider the

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[8] The Third Circuit's opinion, a copy of which has been lodged with the Court, pointedly demonstrates but some of the consideration motivating Congress to preclude judicial review. *Cunningham* involved an attempted "as applied" constitutional challenge in federal court by a litigant aggrieved by the Chief Judge's decision to dismiss Section 372(c) complaints filed against an Article III judge. Absent preclusion of such "as applied" claims, the threat to the values Petitioner invokes would, Respondents submit, be far greater. The vast majority of Section 372(c) complaints are brought by aggrieved litigants and are dismissed by chief judges under Sections 372(c)(3)(A) or (B). Few lead to proceedings, and even fewer lead to council action under Section 372(c)(6). Permitting "as applied" constitutional claims would thus routinely subject chief judges, object judges, and judicial councils to litigation in federal courts by such aggrieved litigants. Even somehow reading Section 372(c)(10) to permit "as applied" challenges limited to some type of "clear abuse of judicial power" standard (as urged in the dissent below), would have the same adverse effects.

validity of council orders." *Id.* (stating that "'where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear") (quoting *Webster*, 486 U.S. at 603); *see also id.* at 220 & n.7 (Pet. App. 336a.)

In an effort to demonstrate that a review-worthy conflict exists, Petitioner points to decisions involving a different statute (Pet. at 13-14) and to what are claimed to be conflicts within the District of Columbia Circuit. The Court rarely if ever grants *certiorari* to resolve alleged intra-circuit conflicts, a role appropriate for an *en banc* proceeding by the particular circuit. The cases relied upon by Petitioner reached different conclusions on the fundamental non-reviewability issue decided below based on readings of different statutory language enacted in different contexts. None of the cases involved Section 372(c)(10) or the Act. *See, e.g.*, *Lepre v. Dep't of Labor*, 275 F.3d 59 (D.C. Cir. 2001); *Ralpho v. Bell*, 569 F.2d 607, 620-21 (D.C. Cir. 1997); *Griffith v. FLRA*, 842 F.2d 487; 494-95 (D.C. Cir. 1988); *Ungar v. Smith*, 667 F.2d 188, 193 (D.C. Cir. 1981). These decisions are not inconsistent with the Act or the decision of the Court of Appeals below with respect to Section 372(c)(10). Indeed, in *Lepre*, which Petitioner asserts is in direct conflict with the decision below, the panel explicitly reasoned that the different statutory structure of Section 372(c) explained the different results: "[*McBryde*] involved Article III judges reviewing a challenge to the imposition of judicial discipline, albeit not in the usual court context; no such circumstances exist in the instant case." *Lepre*, 275 F.3d at 68.

Nor do Petitioner's claims that the Act was wrongly interpreted by the Court of Appeals warrant review. Petitioner's argument ignores a fundamental aspect of the entire Act and Section 372(c), which informed both Congress's decisions regarding judicial review and the reasoning below. Petitioner's characterization of the Judicial Council and Review Committee as "subordinate" administrative bodies "free to trample constitutional rights without judicial oversight," (Pet. 13), fails to

acknowledge that both of these bodies are entirely comprised of Article III judges. Congress vested judicial discipline with a group of Article III judges, and provided for review by yet another group of Article III judges.

The court below in its review of legislative history recognized that Congress, in its consideration of what would become the Act, was fully aware of the concerns raised in *Robison* and other decisions of this Court. *See Johnson v. Robison*, 415 U.S. 361, 366-67 (1974); *Weinberger v. Salfi*, 422 U.S. 749, 761-62 (1975); *Territory of Guam v. Olsen*, 431 U.S. 195, 201-02, 204 (1977). At every step of Petitioner's proceedings, findings of fact and law have been made solely by Article III judges. The Special Committee was comprised of five Article III judges – three appellate judges and two district judges. The Judicial Council that disciplined Petitioner was also comprised of fourteen additional Article III judges. The Review Committee to which Petitioner appealed was also comprised of five Article III judges, none from Petitioner's circuit – three appellate judges and two district judges. Furthermore, the Court of Appeals' examination of the legislative history revealed that the Review Committee of the Judicial Conference was designated as the reviewing body in order to avoid inviting large numbers of complaints against judges by dissatisfied litigants, which could have the effect of chilling judicial decision making. (Pet. App. 11a-13a.) *See also Cunningham*, 275 F.3d 34.

Contrary to Petitioner's assertion that the Court of Appeals "mustered no support in the language or history of the statute to support the notion that Congress clearly intended to preclude as applied challenges while permitting facial ones," (Pet. 13), the court's analysis of the legislative history revealed precisely the opposite: an intention on the part of Congress to permit judicial review of facial constitutional claims, to permit litigants to test and the courts to examine the constitutionality of Congress's own action (enacting the Act), while precluding "as applied" claims to avoid opening the door to numerous individual

challenges to the administration of the Act, because the Act is administered by Article III judges. Unlike other statutory schemes where Congress leaves the administration of the statute to executive personnel with no judicial training or experience, the Act is administered by Article III judges whose training and experience distinguish them from the administrators of other statutory schemes.[9]

## II. Petitioner's "As Applied" Constitutional Arguments Present No Conflict Among the Circuits and Do Not Warrant Review by This Court

Petitioner requests this Court to address one of his three "as applied" constitutional claims: whether "punishing" an Article III judge "based on the merits" of his "rulings" and "actions" violates "judicial independence." (Pet. i). But there are, Respondents submit, several preliminary reasons to deny review of the question Petitioner presents.

Petitioner requests this Court to review the above-quoted question independent of whether this Court agrees to review the determination of the court below that Congress intended that federal courts not entertain "as applied" constitutional challenges to the Act. Normally the Court will first decide that it has authority to address an issue before it addresses that issue. *Cf. Florida v. Thomas*, 532 U.S. 774, 777 (2001); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Unless this Court granted *certiorari* and then reversed the judgment below on the merits of the first question Petitioner raises (Pet. at i, Question 1), precedent suggests that, at least for prudential if not other considerations, the second question Petitioner seeks to raise is not appropriate for review.

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[9] Moreover, and recognizing that it is distinct from the legal issue, the lack of definition and clarity of the nature of Petitioner's "as applied" constitutional claims would make this case a poor vehicle to address such a legal question even if it were otherwise appropriate to do so.

Moreover, this Court has repeatedly stated that it does not review factual matters, *see, e.g.*, Sup. Ct. R. 10; *United States v. Johnston*, 268 U.S. 220, 227 (1925) (stating that the Court does "not grant certiorari to review evidence and discuss specific facts"); *NLRB v. Waterman S.S.*, 309 U.S. 206, 208 (1940), and especially as a court of first instance to do so.

Indeed, both the question Petitioner presents and his "as applied" arguments ask this Court to assume that anything a federal judge does as a judge is a "ruling" or "action" that is "based on the merits" and any consequence authorized by the Act is "punishment." In proceedings below, Petitioner accepted that a federal judge's racial epithets delivered from the bench, or a federal judge's physical assault in court of a party or a litigant, is a "ruling" or "action" that is "based on the merits" for which no "punishment" may constitutionally attach. Respondents respectfully suggest that where a petitioner has deliberately selected to frame a question that requires this Court to accept certain legal characterizations, this Court should not rewrite the question but simply deny review.[10] *Cf.* Sup. Ct. R. 14.1(a) & 14.4 (directing that questions presented should not be argumentative and that failure of a petitioner to present with accuracy, brevity and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is a reason to deny a petition).

Furthermore, Petitioner requests this Court to decide that the sanctions violate the principle of judicial independence (Pet. 16), but Petitioner does not describe or define that claim, much less put it in the context of the question he presents (*see* Pet. i, Question 2). Indeed, all of Petitioner's "as applied" constitu-

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[10] The question, appropriately presented, would be "based on the factual findings and the factual conclusions of the adverse effect on the administration of justice and the business of the courts in the Northern District of Texas, does judicial independence constitutionally prevent a public reprimand, a preclusion of new case assignments for up to one year, or the reassignment of cases to prevent retaliation against witnesses?"

tional claims are difficult to parse, running a spectrum from "evidence-intensive" (Pet. 16, n.2) due process[11] based on charges of bias, rules violations, inadequate notice, and "other pervasive irregularities," to structural due process (unconstitutional to combine investigatory and adjudicative functions), to an "as applied" separation of powers claim indistinguishable from his facial constitutional challenges (disciplinary proceedings against him violated separation of powers because a judge cannot be disciplined other than through impeachment by Congress). In addition, there is no attempted explanation of why it was unconstitutional to publicly criticize him, to not assign him new cases for up to one year, or to prevent him for three years from sitting in cases involving lawyers who testified against him.

Petitioner suggests that implying consequences based on findings of "patterns" of conduct over time is "even more" unconstitutional. (Pet. 18.) Petitioner ignores that the Act has been interpreted and applied where a judge's "patterns" of behavior or "systematic" problems are involved, as distinct from individual decisions, *see, e.g.*, *In re McBryde*, 117 F.3d 208, 230 (5th Cir. 1997); *In re Charge of Judicial Misconduct*, 782 F.2d 181, 181 (9th Cir. 1986); *In re Charge of Judicial Misconduct*, 613 F.2d 768, 768 (9th Cir. 1980); *In re Charge of Judicial Misconduct*, 595 F.2d 517, 517 (9th Cir. 1979); *In re Charge of Judicial Misconduct*, 593 F.2d 879, 881 (9th Cir. 1979); *In re Complaint of Judicial Misconduct*, 2 Cl. Ct. 255 (1983), and does not explain how this impacts his claim.

Petitioner's "as applied" claim is predicated on a view of judicial independence as a value that would insulate Petitioner

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[11] The very nature of Petitioner's vague "as applied" constitutional due process claims, which were rejected by the District Court on the merits (Pet. App. 98a-100a), support the wisdom of Congress's judgment and that of the Third Circuit in *Cunningham* that Section 372(c)(10) precludes plaintiffs – whether they be complainants or judges – from bringing collateral "as applied" constitutional challenges to the Act.

from any of the three sanctions imposed. None of the cases Petitioner cites to bolster his concept of judicial independence articulates any principle of judicial freedom from all discipline, freedom from sanctions for any patterns of conduct, or the like, short of impeachment. While *Chandler* did acknowledge the need to protect judicial independence, *Chandler* also made clear that "it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business." *Chandler v. Judicial Council*, 398 U.S. 74, 84 (1970).[12] No authority expands the protections of Article III to encompass the kind of judicial independence Petitioner promotes, and on which his "as applied" constitutional challenge rests – one that would prohibit any sort of public criticism of a judge for a pattern of abuse, that would prohibit protecting witnesses based on factual findings that such protection was required, and that would prohibit a temporary suspension of new case assignments to allow a judge time to assess his long pattern of abusive conduct.

Finally, the argument Petitioner advances as to why the Act, as applied to him in this case, chilled or otherwise interfered with his judicial independence is vague, ignores the underlying factual findings against him, and mischaracterizes the sanctions imposed. First, as to the public reprimand, Petitioner's "as applied" challenge ignores the factual findings of Petitioner's abusive and disruptive behavior, including that Petitioner has engaged "in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and

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[12] Similarly, while *Northern Pipeline* mentions judicial independence in a footnote, the Court there was primarily concerned with separation of powers, specifically, the problems with granting supplemental and/or pendent jurisdiction over traditional state law contract claims to non-Article III bankruptcy judges, with only the usual form of appellate review. *Northern Pipeline Constr. v. Marathon Pipeline*, 458 U.S. 50 (1982). Likewise, *In re Clay* concerned itself with whether a bankruptcy court judge lacking Article III protections had the authority to conduct a jury trial. *In re Clay*, 35 F.3d 190 (5th Cir. 1994).

discord within, the federal judiciary" and that intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others has "detrimentally affected the effective administration of justice and the business of the courts in the Northern District of Texas." (Pet. App. 159a-60a.) Aside from his promotion of an absolutist view of judicial independence, Petitioner never explains why the issuance of this reprimand, which the Council determined was necessary in order to restore public confidence in the judicial system severely damaged by Petitioner's pattern of abusive conduct, is unconstitutional.

Second, as to the temporary suspension of new case assignments, Petitioner appears to contend that the Act is unconstitutional as applied because the modified suspension of new case assignments is an unconstitutional substitute for impeachment. (Pet. 18.) The suspension of new assignments does not create a constitutional problem. Petitioner was not removed from office. Petitioner's existing cases were unaffected by the Order. As the District Court found below, Petitioner still decided "cases" and "controversies" as an Article III judge. (Pet. App. 97a.) *Cf. Chandler*, 398 U.S. at 74 (declining to invalidate judicial council order which initially removed a judge's *entire* docket and then was modified to take away all new cases *indefinitely*). Moreover, although the maximum length of the suspension was fixed at one year, the minimum period of suspension of new assignments could have been less — indeed, the minimum was within Petitioner's control. Furthermore, the authorities relied upon by Petitioner as questioning the constitutionality of a temporary suspension address primarily a hypothetical situation where a suspension endures for so long that it effectively removes a judge from office completely. *Cf. Hastings v. Judicial Conference of United States* (hereinafter "*Hastings I*"), 770 F.2d 1093, 1108-09 (D.C. Cir. 1985) (Edwards, J., concurring) ("Suspension for a *fifteen year period* strikes me as being the functional equivalent of removal") (emphasis added). Such was not the case here, given the

limited duration of the suspension and Petitioner's own ability to eliminate the suspension.

Third, as to the reassignment provision, the Review Committee affirmed the determination in the Report that there was a substantial risk that Petitioner would retaliate against those individuals who testified adversely to him during the Judicial Council investigation: "[T]he Special Committee has the definite and firm conviction that the likelihood of retaliation by [Petitioner] over the short to intermediate time frame is substantial." (Pet. App. 290a.) This authority to protect witnesses is implicit in the authority to conduct a judicial complaint investigation since, if the subject of such an investigation were free to retaliate against witnesses, the conduct of the investigation would be seriously hampered. *See, e.g., In re Complaint of Judicial Misconduct*, 37 F.3d 1511, 1514 (Jud. Conf. Rev. Comm. 1994) ("The complaint mechanism of the Act will serve its purpose less well if persons who have meritorious grievances are afraid to file a complaint because they fear retaliation, or other adverse consequences, if they do so."); Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265, 345 (1993) ("testimony before the Commission, surveys, and interviews with attorneys reveal a widespread reluctance among members of the bar to file a complaint").

## III. The Question of the Facial Constitutionality of the Act Is Not Appropriate For Review

The decision below on the facial constitutionality of the Act, which decision was unanimous, does not conflict with any decision of this Court or that of any other court of appeals. The other court of appeals which has addressed the facial constitutionality of the Act reached the same conclusion as the court below, *In re Certain Complaints*, 783 F.2d 1488, 1502-1515 (11th Cir. 1986) ("*Hastings II*"), and this Court subsequently cited that decision with approval, *Mistretta v. United States*, 488 U.S. 361, 390 n.16 (1989). Moreover, Petitioner does not

cite *any* judicial authority that purports to conflict with the decision below.[13]

### A. Separation of Powers

The Act on its face does not disturb the balance of powers among the Branches. Congress merely allocated to adjuncts of Article III courts (judicial councils and the Judicial Conference) the authority to deal with complaints concerning judges. This Court's decisions stress a "pragmatic, flexible view" of government powers in analyzing "separation of powers" issues, rejecting "a hermetic division among the Branches," *Mistretta v. United States*, 488 U.S. 361, 380-81 (1989), and upholding as constitutional various statutes that "commingle the functions of the Branches" but pose no danger of either aggrandizing one Branch's power or encroaching on that of another. *Id.* at 382 (collecting cases); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (upholding Article II agency's assumption of jurisdiction over state law counter-claims that could be heard in Article III courts).

In *Hastings II*, the Court of Appeals for the Eleventh Circuit rejected a separation of powers challenge to the Act. That court held that it was entirely appropriate for judges to participate in various administrative activities, including judicial discipline, related to the management of the courts, relying in part upon

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[13] Respondents note that the Petition urges this Court to review the facial constitutionality of the entire Act. (*See* Pet. i, Question 3.) Yet, the judgment below reflects that Petitioner's facial constitutional challenge to the Act was decided except for the facial challenge to one section (Section 372(c)(6)(B)(iv), authorizing the suspension of assignment of new cases), which was dismissed as moot. But Petitioner does not seek review by this Court of this aspect of the judgment. (*See* Pet. i, Question 3.) The attempt to argue in the Petition that the mootness ruling was incorrectly decided cannot overcome Petitioner's failure to seek review in this Court. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips*, 510 U.S. 27, 32 n.5 (1993); *General Talking Pictures v. Western Electric*, 304 U.S. 175, 178 (1938); *see also Adarand Constructors v. Mineta*, 534 U.S. 103 (2001).

this Court's decision in *Chandler*, 398 U.S. at 86 n.7, and emphasizing the view that the Act minimized separation of powers concerns because it assigned responsibility for judicial discipline to the Judicial Branch, not to some other Branch of government. 783 F.2d at 1505-06 & n.13. In *Mistretta*, this Court upheld the establishment of the Sentencing Commission as part of the Judicial Branch on the ground that "Congress may delegate to the Judicial Branch non-adjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary." 488 U.S. at 388. The Court wrote that it had recognized Congress's power to create a number of administrative agencies within the Judicial Branch, including the Judicial Conference of the United States, the Rules Advisory Committee, and the Administrative Office, *id.* at 388-89, and specifically cited *Hastings II* as "upholding [the] statute authorizing [a] judicial council to investigate improper conduct by [a] federal judge." *Id.* at 390 n.16. *See also Morrison v. Olson*, 487 U.S. 654, 693-96 (1988) (rejecting separation of powers challenge to the independent counsel statute).

Petitioner's argument that the Act is facially unconstitutional as a violation of separation of powers is based on this reasoning: because Congress alone has the power to impeach Article III judges for specific reasons, Congress may not direct other Branches to impose discipline (short of impeachment) upon Article III judges for misconduct and abuse. (Pet. 22-23.) Or, that the existence of one constitutional power (removal from office) in one circumstance ("Treason, Bribery, or other high Crimes and Misdemeanors") in the Legislative Branch constitutionally precludes the Legislative Branch from authorizing the Judicial Branch to impose consequences other than removal from office for different acts of conduct. But the decisions of this Court reject that reasoning, *see Mistretta*, 488 U.S. at 371-73, 390; *Morrison*, 487 U.S. at 685-96, and both the court of appeals below and in *Hastings II* specifically rejected such

attack on the Act, *see Hastings II*, 783 F.2d at 1505, 1512; Pet. App. 19a-22a. *See also Chandler*, 378 U.S. at 85 (rejecting the notion that "the extraordinary machinery of impeachment" is the only recourse when a judge refuses to abide by reasonable judicial procedures).

### B. Judicial Independence

Petitioner also argues that the Act is unconstitutional on its face because it intrudes upon judicial independence. Like the court below, the only other circuit court to address this issue held to the contrary, as this Court did in addressing the identical statutory language in the Act's predecessor.

In *Chandler*, this Court, in rejecting the dissenting views of Justices Black and Douglas, concluded that the Judicial Branch — in particular, circuit judicial councils — may take reasonable steps under Section 332 to investigate and to address the conduct of individual judges prejudicial to the administration of justice. *See id.* at 86 n.7 ("no constitutional obstacle" to administrative power of circuit councils). Justice Harlan concurred, writing that while the principle of judicial independence "holds a profoundly important place in our scheme of government," he could discern "no incursion on that principle in the legislation creating the Judicial Councils and empowering them to supervise the work of the district courts, in order to ensure the effective and expeditious handling of their business." *Id.* at 129. And in *Hastings II*, the court held that judicial council actions authorized under Section 372(c)(6) of the Act were not "of a type which can powerfully interfere with a judge's independence," 783 F.2d at 1508, reiterating that the Act "facially and in broad design" was constitutional, *id.* at 1507, and the Act did not "transgress the Constitution's vision of the independence of each Article III judge." *Id.* at 1509.

Employing the major criteria articulated by this Court, the absence of any conflict demonstrates review should be denied. In addition, Respondents respectfully suggest that the extreme

proposition Petitioner advances is fundamentally wrong. The notion that any and every Article III judge is anointed with a non-textual constitutional immunity from congressionally authorized investigation of conduct (no matter how abusive) or physical or mental disability; from congressionally authorized criticism (in private or in public); or from congressionally authorized temporary suspension of additional assignments is alien to our history, our traditions, our jurisprudence, and our systemic and societal needs.

## IV. Petitioner's Request To Review the Manner in Which the Disciplinary Investigation Was Conducted Presents No Question Appropriate For Review by This Court

Petitioner's final question is whether this particular investigation was improper because the Council supposedly exceeded its statutory authority in this case. To raise that question, which was not decided below because of Section 372(c)(10), Petitioner argues that *Leedom v. Kyne* should control and permit review of his case. Once reached, according to Petitioner, his statutory claims are meritorious because (i) the Act precludes a council from expanding an investigation beyond the four corners of a complaint and (ii) the Council investigated and punished him based on the merits of his decisions and, in so doing, exceeded its jurisdiction under the Act.

This Court has repeatedly stated that it does not sit to review the facts of individual cases. *See, e.g., NLRB v. Waterman S.S.*, 309 U.S. 230, 208 (1940); *General Talking Pictures v. Western Electric*, 304 U.S. 175, 178 (1938); *Southern Power v. North Carolina Public Service*, 263 U.S. 508, 509 (1924). In this case, the Review Committee examined, and rejected, each of Petitioner's contentions that the investigation of him and the proceedings involving him were inappropriate under the complaint rules and the statute. (Pet. App. 132a-40a.) The court below held that Section 372(c)(10) precluded review of these contentions. Petitioner now asks this Court to hear two

issues peculiar to him, first the application of Section 372(c)(10) to these rulings by the Review Committee,[14] and then the correctness of the Review Committee's determinations, based on the facts of the investigation of and the proceeding involving Petitioner, that the Council acted in accordance with the complaint rules and the procedural provisions of the Act.

Neither issue warrants review by this Court and, in any event, Petitioner's arguments regarding the exercise of authority beyond the scope of the Act are without merit. First, as the Review Committee determined, the Special Committee's expansion of the investigation beyond the filed complaints was specifically authorized by the Complaint Rule 9(A). Virtually identical rules have been adopted by all judicial circuits, pursuant to the authority vested in councils under Subsection (c)(11) of the Act, which authorizes "[e]ach judicial council . . . [to] prescribe such rules for the conduct of proceedings under this subsection . . . as each considers appropriate." In addition, Subsection (c)(5) of the Act authorizes a special committee to "conduct an investigation as extensive as it considers necessary[.]" As the Review Committee commented in the context of this investigation, not only was it permissible for the Special Committee to expand the scope of the investigation once it uncovered evidence of a possible pattern of abusive conduct, it was "affirmatively desirable." (Pet. App. 135a.)

Second, as to Petitioner's arguments that the Special Committee and the Council exceeded their authority under the Act

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[14] *Leedom v. Kyne*, 358 U.S. 184 (1958), did not involve a statute including a review preclusion provision, but the Court was asked to "imply" preclusion of review based upon legislative silence on the point. In numerous cases, *Kyne* has been distinguished on this ground, and statutes similar to Section 372(c)(10) have been held to preclude judicial review of claims that an agency supposedly acted in violation of statute or rule. *See Board of Governors v. MCorp Fin. Inc.*, 502 U.S. 32, 42-44 (1991); *Briscoe v. Bell*, 432 U.S. 404, 410 (1977). *See also In re McBryde*, 120 F.3d 519, 523 (5th Cir. 1997) ("*McBryde II*").

by reviewing the merits of Petitioner's decisions and procedural rulings, there is no jurisdictional limitation in the Act of the kind Petitioner suggests. The Act gives a chief judge discretion (using the word "*may*") to dismiss complaints that are "*directly* related to the merits" of a judge's rulings. *See* 28 U.S.C. § 372(c)(3)(A)(ii) (emphasis added). Moreover, as the Special Committee, the Council, the Review Committee and the two courts below have all stated, Petitioner was not disciplined based on the merits of his decisions, but rather for his abusive conduct. As the Review Committee stated, the "fact that that abuse is largely evidenced by the judge's rulings, statements, and conduct on the bench does not shield the abuse from investigation under the Act." (Pet. App. 143a.) Indeed, as the District Court below commented, the "Review Committee's analysis reflects deep respect for the important distinction between the merits of a judicial decision and the conduct of the judge rendering the decision." (Pet. App. 91a.)

## CONCLUSION

The petition for writ of certiorari should be denied.

Dated: New York, New York
August 7, 2002

Respectfully Submitted,

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No. 01-1778

# In the Supreme Court of the United States

JOHN H. MCBRYDE, JUDGE,
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, PETITIONER

*v.*

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT
AND DISABILITY ORDERS OF THE JUDICIAL
CONFERENCE OF THE UNITED STATES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

The brief for the United States will address the following question:

Whether the disciplinary provisions of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. 372(c), are facially constitutional.

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*ON PETITION FOR A WRIT OF CERTIORARI*
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*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 264 F.3d 52. The opinion of the district court (Pet. App. 52a-120a) is reported at 83 F. Supp. 2d 135.

### JURISDICTION

The judgment of the court of appeals was entered on September 21, 2001. A petition for rehearing was denied on February 1, 2002 (Pet. App. 302a-304a). On April 16, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 1, 2002, and the petition was filed on June 3, 2002 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This case arises out of a disciplinary proceeding brought under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (Act), 28 U.S.C. 372(c). Petitioner is a federal district judge who was disciplined under the Act for "intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others." Pet. App. 160a. Petitioner sued the judicial bodies involved in the disciplinary proceeding, contending that the Act is unconstitutional on its face and that the defendants had applied the Act to him in a manner that was both unconstitutional and unauthorized by the statute. The United States intervened to defend the facial constitutionality of the Act. The district court held that review of petitioner's non-constitutional claims was precluded by the Act; it rejected petitioner's facial constitutional challenge to the Act and all but one of petitioner's as-applied constitutional claims. *Id.* at 52a-120a. Petitioner appealed. The court of appeals affirmed in part and vacated in part. *Id.* at 1a-51a.

1. Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 in order to "provide[] a simple and clear procedure for the resolution of alleged disability or misconduct of a Federal judge." S. Rep. No. 362, 96th Cong., 1st Sess. 2 (1979) (Senate Report). The Act is grounded in the principle of judicial self-administration. Acting in consultation with members of the federal Judiciary, Congress sought to devise "a fair and proper procedure whereby the judicial branch of the Federal Government can keep its own house in order." *Id.* at 11; see H.R. Rep. No. 512, 101st Cong., 2d Sess. 10 (1990) (sum-

marizing judicial participation in development of the Act).

The Act's disciplinary procedures are triggered when a judge is alleged to have "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. 372(c)(1).[1] That standard is intended to reach "willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, and other conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Senate Report 9. Any person who believes that a judge has engaged in misconduct within the scope of the Act may file a written complaint setting forth "a brief statement of the facts constituting such conduct." 28 U.S.C. 372(c)(1). Alternatively, the Chief Judge of the Circuit may issue a written order identifying a complaint. *Ibid.*

A complaint is subject to dismissal by the Chief Judge if, *inter alia*, it is frivolous or is "directly related to the merits of a decision or procedural ruling." 28 U.S.C. 372(c)(3)(A). The Chief Judge also may conclude the proceeding if he finds that corrective action has been taken or that intervening events have made action on the complaint unnecessary. 28 U.S.C. 372(c)(3)(B). Otherwise, the Act directs the Chief Judge to convene a special committee, comprising the Chief Judge himself and equal numbers of circuit and district judges, to "investigate the facts and allegations contained in the complaint." 28 U.S.C. 372(c)(4)(A).

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[1] The Act also applies to situations in which a judge is "unable to discharge all the duties of office by reason of mental or physical disability." 28 U.S.C. 372(c)(1). This case does not present any question regarding the disability provisions of the Act.

The special committee is empowered to "conduct an investigation as extensive as it considers necessary." 28 U.S.C. 372(c)(5). At the conclusion of the investigation, the special committee "shall expeditiously file a comprehensive written report" with the Judicial Council of the Circuit. *Ibid.* The report presents the findings of the investigation and the special committee's recommendations for "necessary and appropriate action" by the Judicial Council. *Ibid.*

Following receipt of the special committee's report, the Judicial Council may conduct "any additional investigation which it considers to be necessary." 28 U.S.C. 372(c)(6)(A). If the Judicial Council determines that no action is required, it may dismiss the complaint. 28 U.S.C. 372(c)(6)(C). Otherwise, the Act authorizes the Judicial Council to take "such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit." 28 U.S.C. 372(c)(6)(B). The Judicial Council may, *inter alia*, (1) request that the judge voluntarily retire; (2) censure or reprimand the judge, either privately or publicly; (3) order that the judge not be assigned further cases, but only "on a temporary basis for a time certain"; or (4) order "such other action as it considers appropriate under the circumstances." 28 U.S.C. 372(c)(6)(B)(iii)-(vii).[2]

A judge or a complainant who is aggrieved by the Judicial Council's disposition of a complaint may peti-

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[2] Alternatively, the Judicial Council may refer the complaint, together with the record and recommendations for appropriate action, to the Judicial Conference. 28 U.S.C. 372(c)(7)(A). In the event of a referral, the Judicial Conference may conduct "such additional investigation as it considers appropriate," and may take the same remedial steps that are available to the Judicial Councils. 28 U.S.C. 372(c)(8)(A).

tion the Judicial Conference to review the Council's action. 28 U.S.C. 372(c)(10). The Judicial Conference may review the petition itself or may exercise its review authority through a standing committee appointed by the Chief Justice (Review Committee). 28 U.S.C. 331. Except as expressly provided in the Act, "all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." 28 U.S.C. 372(c)(10).

The corrective measures available to the Judiciary under the Act are "designed to deal with those matters which do not rise to the level of impeachable offenses" and to "fill the void * * * between the impeachable offenses and doing nothing at all" about lesser forms of judicial misconduct. Senate Report 3, 5. To protect Congress's authority under the impeachment provisions of Article I, the Act expressly prohibits Judicial Councils or the Judicial Conference from removing any Article III judge from office. 28 U.S.C. 372(c)(6)(B)(vii)(I), 372(c)(8)(A). If a Judicial Council determines that an Article III judge "may have engaged in conduct" that "might constitute one or more grounds for impeachment," the Council is required to certify that determination to the Judicial Conference. 28 U.S.C. 372(c)(7)(B)(i). If the Judicial Conference concurs in the Council's determination, or makes such a determination itself, it is directed to transmit the determination and the record of proceedings to the House of Representatives, which may take "whatever action [it] considers to be necessary." 28 U.S.C. 372(c)(8)(A); see generally *Hastings* v. *Judicial Conference*, 829 F.2d 91, 101-103 (D.C. Cir. 1987) (*Hastings II*) (discussing certification provisions), cert. denied, 485 U.S. 1014 (1988).

2. In 1995, an attorney filed a complaint against petitioner under the Act, alleging that petitioner had engaged in "obstructive, abusive, and hostile conduct" during a trial. Pet. App. 57a. The complaint was presented to the Chief Judge of the Fifth Circuit, who subsequently identified several additional complaints about petitioner. Acting pursuant to 28 U.S.C. 372(c)(4), the Chief Judge appointed a Special Committee to investigate the allegations of misconduct. After conducting an extensive investigation, the Special Committee presented respondent Judicial Council with a report containing its findings and recommendations, as provided by 28 U.S.C. 372(c)(5). Pet. App. 163a-292a.

The report identified numerous episodes in which petitioner had engaged in unwarranted and abusive treatment of lawyers and other court personnel. Pet. App. 173a-264a; see *id.* at 61a-67a (district court opinion) (discussing representative episodes). Taken together, those incidents demonstrated what the Special Committee characterized as "alarming patterns of conduct" by petitioner, including a proclivity to question the integrity of attorneys appearing before him; a tendency to overreact to perceived transgressions and to impose abusive sanctions; an obsessive need for control; and disrespect for his fellow judges. *Id.* at 265a-270a. The Special Committee found that those patterns of conduct had exerted a pervasive chilling effect on the local legal community, deterring attorneys from representing their clients properly and impairing the administration of justice. *Id.* at 270a-275a.

The Special Committee recommended that petitioner be offered the opportunity to retire voluntarily. C.A. App. 3344-3345; see 28 U.S.C. 371, 372(c)(6)(B)(iii). Alternatively, the Special Committee recommended

that the Judicial Council publicly reprimand petitioner; that no new cases be assigned to him for one year; and that, to prevent retaliation and to protect the integrity of the investigatory process, petitioner be disqualified for three years from participating in cases involving attorneys who testified against him in the proceedings or had been listed as potential witnesses. C.A. App. 3345-3352.

In December 1997, the Judicial Council issued an order adopting the one-year case assignment and three-year disqualification measures recommended by the Special Committee. C.A. App. 3367-3369. In addition, the Judicial Council publicly reprimanded petitioner "for conduct prejudicial to the effective and expeditious administration of the business of the courts within the Circuit and inconsistent with Canon 2(A) and Canon 3(A)(3) of the Code of Conduct for United States Judges." Pet. App. 159a-160a. The Judicial Council's reprimand stated that petitioner had "engaged in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and discord within, the federal judiciary." *Id.* at 160a. The reprimand further stated that petitioner had "abused judicial power, imposed unwarranted sanctions on lawyers, and repeatedly and unjustifiably attacked individual lawyers and groups of lawyers and court personnel," and that petitioner's "intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others has detrimentally affected the effective administration of justice and the business of the courts in the Northern District of Texas." *Ibid.*

Petitioner filed petitions for review with respondent Review Committee of the Judicial Conference. The Review Committee modified the one-year suspension of new case assignments, directing that assignments were

to be resumed before the end of the one-year period if "the [Judicial] Council finds that [petitioner's] conduct indicates that he has seized the opportunity for self-appraisal and deep reflection in good faith and that he has made substantial progress toward improving his conduct." Pet. App. 158a. The Review Committee affirmed the Council's order in all other respects. *Ibid.* The one-year suspension of new case assignments took effect in September 1998 and ended in September 1999; the three-year disqualification period began in February 1998 and ended in February 2001. *Id.* at 3a.

3. Following the Review Committee's decision, petitioner brought suit in the District Court for the District of Columbia, naming as defendants the Judicial Council, the Review Committee, the Chief Judge of the Fifth Circuit, and the Chairman of the Review Committee (collectively the judicial respondents). Petitioner contended that the provisions of the Act authorizing the federal judiciary to investigate and correct acts of judicial misconduct violate principles of separation of powers and are therefore facially unconstitutional. Petitioner also argued that the judicial respondents had applied the Act to him in an unconstitutional manner. In addition, petitioner asserted that the disciplinary proceeding had violated various provisions of the Act itself. Pursuant to 28 U.S.C. 2403(a), the United States intervened to defend the facial constitutionality of the Act.

Petitioner presented two related claims of facial unconstitutionality. First, petitioner argued that the principles of judicial independence embodied in Article III of the Constitution, which protect the federal Judiciary from interference by the other Branches of government, also preclude the Judiciary from policing misconduct by its members. Second, petitioner argued

that the impeachment provisions of Articles I and II, under which "all civil officers of the United States" who commit "high Crimes and Misdemeanors" may be removed from office by Congress, disable the Judiciary from taking any other measures to deal with judicial misconduct that falls short of an impeachable offense. Art. II, § 4.

The district court rejected petitioner's principal claims for relief. Pet. App. 52a-120a. The court held that 28 U.S.C. 372(c)(10), which makes "all orders and determinations [of the Review Committee] * * * final and conclusive" and "not * * * judicially reviewable on appeal or otherwise," precluded the court from entertaining petitioner's non-constitutional challenges to the disciplinary proceedings, but did not affect its jurisdiction over petitioner's constitutional claims. Pet. App. 83a-96a. The court then considered and rejected all of petitioner's challenges to the facial constitutionality of the Act and all but one of his as-applied constitutional claims, ruling in his favor only with respect to a claim that the application of the Act's confidentiality provision (28 U.S.C. 372(c)(14)) violated his First Amendment rights. Pet. App. 73a-83a, 96a-120a.

4. The court of appeals affirmed in part and vacated in part. Pet. App. 1a-51a.

a. The court of appeals first addressed the question whether petitioner's claims had been rendered moot by intervening developments. By the time of the court's decision, petitioner's one-year suspension from new case assignments and his three-year disqualification from participating in cases involving witnesses had both ended. The court of appeals held that petitioner's challenges to the suspension and the disqualification were moot. The court of appeals therefore declined to reach the merits of petitioner's constitutional claims

regarding the suspension and disqualification, and it vacated the judgment of the district court insofar as that court had addressed petitioner's challenges to those sanctions. Pet. App. 3a, 4a-5a.

The court next addressed the preclusive effect of 28 U.S.C. 372(c)(10) on the district court's jurisdiction. The court held that Section 372(c)(10) precluded review of petitioner's as-applied constitutional claims as well as of his non-constitutional challenges. Pet. App. 7a-17a. The court of appeals explained that the Act vests the Judicial Conference with authority to entertain as-applied constitutional challenges to disciplinary decisions by Judicial Councils, and the court requested the Judicial Conference to hear petitioner's as-applied constitutional claims. *Id.* at 14a-15a, 24a.

Finally, the court addressed and rejected petitioner's challenges to the facial constitutionality of the Act. The court unanimously held that the Act does not impermissibly trench on judicial independence under Article III and is not inconsistent with the process of impeachment established by Articles I and II. Pet. App. 18a-25a. The court observed that both of petitioner's facial constitutional challenges rest on the "core assumption that judicial independence requires absolute freedom from * * * lesser sanctions" than removal from office, even when the authority to impose those sanctions is placed in the hands of the Judiciary itself. *Id.* at 19a. The court rejected that premise. The court concluded that Article III is designed "to safeguard the [Judicial] branch's independence from its two competitors," not to insulate individual judges from oversight by the Judiciary itself. *Id.* at 18a-19a. The court further held that by vesting Congress with the power to remove federal officials from office for high crimes and misdemeanors, the Constitution did not

thereby preclude intra-Branch discipline for lesser forms of misconduct. *Id.* at 19a-22a. In so holding, the court reserved the question "whether a long-term disqualification from [hearing] cases could, by its practical effect, [e]ffect an unconstitutional 'removal'" of a judge from office. *Id.* at 22a n.5.

Judge Tatel filed an opinion concurring in part and dissenting in part. Pet. App. 25a-51a. Judge Tatel "agree[d] with the [panel majority] * * * that the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 is not facially unconstitutional." *Id.* at 25a. He also agreed that the Act precludes judicial review of petitioner's statutory claims. *Ibid.* Judge Tatel would have held, however, that the Act does not bar review of petitioner's as-applied constitutional challenges, and with respect to one of those claims he would have reversed the judgment of the district court. *Ibid.* Judge Tatel had "no doubt that several of [petitioner's] actions were clearly sanctionable" as "flagrant abuses of judicial power." *Id.* at 50a. He expressed the view, however, that the Special Committee had also "included in its Report many actions and incidents which either seem to be entirely appropriate or involve conduct that might have been appropriate under some circumstances." *Ibid.* Judge Tatel would have "remanded the case to the Council with instructions to limit its Report to evidence that, when viewed objectively, demonstrates a pattern of conduct that amounts to a *clear* abuse of judicial power, or a pattern of conduct *clearly* prejudicial to the adversarial process." *Ibid.*

## ARGUMENT

The court of appeals held that the disciplinary provisions of the Judicial Councils Reform and Judicial

Conduct and Disability Act of 1980, 28 U.S.C. 372(c), are not facially unconstitutional. That holding is correct and does not conflict with any decision of this Court or of any other court of appeals. With respect to Question 3 presented by the petition, further review is not warranted.[3]

1. The court of appeals correctly rejected petitioner's argument that the Act unconstitutionally infringes on judicial independence. The Tenure and Compensation Clauses of Article III "were incorporated into the Constitution to ensure the independence of the Judiciary from control of the Executive and Legislative Branches of government." *Mistretta* v. *United States*, 488 U.S. 361, 410 n.32 (1989); see *United States* v. *Will*, 449 U.S. 200, 218 (1980) (Compensation Clause ensures that "claims [are] decided by judges who are free from potential domination by other branches of government"); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 15-16 (1955) ("The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government."); *O'Donoghue* v. *United States*, 289 U.S. 516, 531 (1933).

The Act is entirely consistent with that constitutional requirement. Under the Act, the authority to investigate alleged judicial misconduct, and to "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts

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[3] The United States intervened in the district court pursuant to 28 U.S.C. 2403 to defend the Act against petitioner's facial constitutional challenge. This response is confined to that issue. The Solicitor General has authorized the judicial respondents to submit their own response to the petition through private counsel, and their response addresses the other questions presented by the petition.

within the circuit" when misconduct is discovered (28 U.S.C. 372(c)(6)(B)), is placed in the hands of the Judicial Branch itself. Because "the judicial disciplinary system * * * is administered by the judiciary itself, not by the legislature or the executive," it is "a manifestation of the independence of the judicial branch, rather than a limitation upon it." Hon. Stephen G. Breyer, *Judicial Independence in the United States*, 40 St. Louis U. L.J. 989, 990 (1996).

Petitioner's argument rests on the premise that Article III is designed not only to insulate the Judiciary from the Executive and Legislative Branches, but also to insulate individual judges from oversight by other members of the Judiciary. That premise is fundamentally at odds with the structure of Article III itself. The "judicial Power" created by Article III is vested not in individual judges, but in courts—"one supreme Court, and * * * such inferior Courts as the Congress may from time to time ordain and establish." And as the court of appeals observed, "what Article III creates [is] not a batch of unconnected courts, but a judicial *department*." Pet. App. 18a (quoting *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995)).

In *Chandler* v. *Judicial Council*, 398 U.S. 74 (1970), this Court held that "no constitutional obstacle prevent[s] Congress from vesting in the Circuit Judicial Councils, as administrative bodies, authority to make all necessary orders for the effective and expeditious administration of the business of the courts within [each] circuit." *Id.* at 86 n.7 (internal quotation marks omitted). The Court explained that individual judges are not entitled to choose their own "manner of conducting judicial business" (*id.* at 84) free from direction and control by other judges. Two dissenting Justices expressed the view that "[o]nce a federal judge is

confirmed by the Senate and takes his oath, he is independent of every other judge." *Id.* at 136 (Douglas, J., joined by Black, J., dissenting). But the Court rejected that view, stating:

> There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business.

*Id.* at 84. *Chandler* thus "reject[s] any fixed notion * * * that courts are mere collections of individual judges, each of whom is a complete law unto himself or herself." *In re Certain Complaints*, 783 F.2d 1488, 1505 (11th Cir.), cert. denied, 477 U.S. 904 (1986).

Every court that has addressed the issue has concluded that the Act does not on its face violate constitutional principles of judicial independence. In *In re Certain Complaints*, the Eleventh Circuit squarely rejected a facial challenge essentially identical to the one presented here. See 783 F.2d at 1507-1508. The court explained:

> [T]he fact that [the Act] places the investigation, and the determination of what actions to take, entirely within the hands of judicial colleagues makes it likely that the rightful independence of the complained-against judge, especially in the area of decision-making, will be accorded maximum respect. Because of their own experience, other judges can be expected to understand the demands unique to their profession; and as each is a decision-maker himself, these other judges may be expected to refrain from applying sanctions that could chill the

> investigated judge's freedom to decide cases as he sees fit, since such sanctions could be a precedent that could be turned against any judge. Above all, judges will certainly be reluctant to take any action that would predictably inhibit the free and independent functioning of the courts.

*Id.* at 1508; accord *Hastings* v. *Judicial Conference*, 593 F. Supp. 1371, 1379-1381 (D.D.C. 1984), aff'd in part and vacated in part on other grounds, 770 F.2d 1093 (D.C. Cir. 1985).

2. a. The court of appeals was also correct in rejecting petitioner's claim that the Act's provisions for addressing judicial misconduct are inconsistent on their face with the impeachment provisions of Articles I and II. Congress—which, of course, has a profound institutional interest in preserving, rather than diluting, its own impeachment power—took pains to ensure that the terms of the Act did not interfere with the impeachment mechanism. See Senate Report 4-5. Although the Act gives the Judicial Councils and the Judicial Conference broad latitude to take "appropriate" actions in response to judicial misconduct, it expressly prohibits the "removal from office of any judge appointed to hold office during good behavior." 28 U.S.C. 372(c)(6)(B)(vii)(I). And where a judicial investigation produces evidence of potentially impeachable conduct, the Act calls for the Judiciary to bring the relevant information to the attention of the House of Representatives, which has "the sole Power of Impeachment" under Article I. Art. I, § 2, Cl. 5; 28 U.S.C. 372(c)(7)(B)(i), 372(c)(8)(A); *Hastings II*, 829 F.2d at 101-103. The Act's disciplinary provisions are designed not to provide a statutory alternative to impeachment, but instead to address judicial misconduct that does not

rise to the level of impeachable offenses; the Act provides for sanctions that do not involve Article I's remedy (removal from office) for conviction by the Senate after impeachment by the House of Representatives, and do not trench on the tenure and compensation guarantees of Article III. See Senate Report 3 (Act "is a supplement to, but not a substitute for," the impeachment process, "and is designed to deal with those matters which do not rise to the level of impeachable offenses").

Nothing in the text, history, or structure of the Impeachment Clauses suggests an intent to immunize federal judges from all discipline for misconduct not rising to the level of an impeachable offense. As the court of appeals recognized (Pet. App. 21a-22a), moreover, the impeachment provisions apply equally to "all civil Officers of the United States" (Art. II, § 4) and were directed at least at much at the Executive Branch as at the Judiciary. See The Federalist No. 65, at 396, 397 (Alexander Hamilton) (C. Rossiter ed. 1961) (characterizing impeachment as "a bridle in the hands of the legislative body upon the executive servants of the government"). If the bare existence of the impeachment mechanism, together with the absence of any other explicit constitutional mechanism for sanctioning official misconduct, were enough to demonstrate an intent that impeachment be an exclusive remedy, that inference would apply with equal force to all "civil Officers of the United States." Yet the impeachment provisions can hardly be thought to furnish the only constitutionally permissible means of punishing misconduct on the part of Executive Branch officers. The only other courts to address the issue have likewise concluded that the impeachment provisions of the Constitution do not render the Act's disciplinary pro-

visions facially unconstitutional. See *In re Certain Complaints*, 783 F.2d at 1506-1507; *Hastings*, 593 F. Supp. at 1381.

b. Petitioner suggests in particular (see Pet. 25) that 28 U.S.C. 372(c)(6)(B)(iv), which authorizes a Judicial Council to discontinue the assignment of new cases to a judge "on a temporary basis for a time certain," conflicts with Congress's constitutional authority to impeach and remove judges from office. That provision authorizes a remedy not contemplated by the Impeachment Clauses, and otherwise presents no conflict with Congress's impeachment and removal powers. Moreover, the propriety of petitioner's own one-year suspension from new case assignments is not presented by the decision below. The court of appeals held that the expiration of the suspension had mooted petitioner's claim relating to that sanction. Pet. App. 3a, 4a-5a. The court therefore reserved the question "whether a long-term disqualification * * * could, by its practical effect, [e]ffect an unconstitutional 'removal'" of a judge from office. *Id.* at 22a n.5. Absent a decision by the court of appeals on the merits of petitioner's constitutional challenge to his suspension, that claim does not warrant review by this Court. And petitioner does not contend that the mootness holding itself presents a question of broad and recurring importance.

In any event, the court of appeals' ruling on mootness is correct. Although petitioner originally sought a temporary restraining order to prevent the suspension of new case assignments from going into effect, the district court denied injunctive relief, and the suspension thereafter ran its course. As a result, it is far too late for an injunction to forestall the effects of the

suspension.[4] Petitioner asserts that he would "be better off if the temporary impeachment blot were removed from his record," presumably through the issuance of a declaratory judgment. Pet. 21. But even if a court declared that the Act's provision regarding suspension of case assignments conflicts with Congress's impeachment powers, such a declaration would not vindicate petitioner's reputational interests, since it would speak only to the power of the Judicial Council and would say nothing about the blameworthiness of petitioner's own conduct. See Pet. App. 7a.

Petitioner also suggests that the controversy between him and the judicial respondents over the suspension issue is capable of repetition because he "could again find himself subject to similar proceedings based on his exercise of proper judicial functions in the manner in which he customarily carries them out." Pet. 21-22. That suggestion assumes that petitioner cannot or will not conform his behavior to the standards of judicial conduct relied on by the Judicial Council—an

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[4] Petitioner asserts that his docket "still suffers from the loss of hundreds of cases that were diverted to other judges because of the case suspensions." Pet. 21. But even if that is so, it is highly doubtful that the district court hearing this case could meaningfully address that situation. Authority over the assignment of cases in a judicial district is vested by statute in the district court and its chief judge (see 28 U.S.C. 137), and neither the District Court for the Northern District of Texas nor the chief judge of that court is a party to this suit. Moreover, it is far from obvious that a judge's desire to have particular cases (or a particular number of cases) assigned to his docket is a cognizable interest for Article III purposes. Cf. *Moore* v. *U.S. House of Representatives*, 733 F.2d 946, 959-960 (D.C. Cir. 1984) (Scalia, J., concurring in the result) (for standing purposes, officers of the United States have no "judicially cognizable private interest" in the powers of their office), cert. denied, 469 U.S. 1106 (1985).

assumption that (as the court of appeals pointed out, see Pet. App. 4a-5a) this Court has declined to accept. And even if there were a "reasonable expectation" (*Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)) that petitioner will be subject to further disciplinary proceedings, it would remain highly speculative whether those proceedings would result in the suspension of new case assignments.

Finally, even if the constitutional issue pressed by petitioner were a live one, and even if it had been reached and decided by the court of appeals, there would be no merit to petitioner's suggestion that the Act's provision for temporary suspension of new case assignments is facially unconstitutional. In order to prevail on a facial challenge to a statutory provision, "the challenger must establish that no set of circumstances exists under which the [provision] would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Even if it were assumed that a sufficiently long suspension of new case assignments would be tantamount in its practical impact to a removal from office, nothing on the face of the Act compels such extended suspensions as a matter of course. To the contrary, the Act demands that any suspension of new case assignments be "temporary," and it identifies no minimum suspension period. Accordingly, under the temporary suspension provision, a Judicial Council is free to limit a suspension to a matter of months or even weeks if it sees fit. Petitioner does not seriously suggest that a suspension of new case assignments would be equivalent to removal from office even if it were so brief that it did not significantly affect the size of the judge's docket or the nature of his judicial activities. The mere possibility that the suspension provision could be

misapplied in a particular case does not call the facial constitutionality of the provision into question.

## CONCLUSION

With respect to Question 3 presented by the petition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-1778

IN THE

# Supreme Court of the United States

THE HONORABLE JOHN MCBRYDE,

*Petitioner,*

v.

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## INTRODUCTION

The briefs in opposition of the judicial respondents and the United States fail to obscure the two most critical features that make this case appropriate for resolution by this Court: (1) The court of appeals' ruling stands apart from federal judicial precedents in holding that a statute can and does foreclose any court from considering a substantial constitutional claim — a holding that, as this Court has repeatedly stated, is itself of highly doubtful constitutionality. (2) The effect of the court's ruling is to approve the punishment of a federal judge by judicial administrative bodies, based upon their disagreement with his substantive and procedural judicial rulings and actions, without any consideration by a court of his substantial constitutional claim that that punishment infringes core values of Article III judicial independence.

The judicial respondents' brief in opposition, while asserting the absence of a conflict among the circuits on these precise points, does not contest that their resolution is a matter of importance to the judicial system. And the United States' brief in opposition does not oppose a grant of certiorari on these issues, but confines itself solely to opposing a grant of certiorari on the facial constitutionality of the Judicial Conduct and Disability Act.

Both the court of appeals' novel and unprecedented review-preclusion ruling and the as-applied constitutional claim of infringement on judicial independence that that ruling foreclosed should be addressed by this Court. Simultaneously, to settle important questions fundamental to the administration of the Judicial Conduct and Disability Act, the Court should take up the facial constitutionality of the Act's disciplinary provisions and whether its terms authorize discipline for conduct that is not the subject of any complaint and is related to the merits of judicial rulings.

### I. The Review Preclusion Issue Merits Review.

The judicial respondents assert that there is no direct conflict among the Circuits over whether 28 U.S.C. § 372(c)(10)

bars as-applied constitutional challenges to judicial discipline under the Judicial Conduct and Disability Act. That is true, but trivially so. More to the point is that a host of opinions of this Court, other circuits, and the D.C. Circuit itself hold that statutes whose language is indistinguishable do *not* bar review of constitutional claims; that the federal courts, following *Johnson v Robison*, 415 U.S. 361 (1974), and *Webster v. Doe*, 486 U.S. 592 (1988), have repeatedly stated that only a compelling, affirmative expression of legislative intent to bar review of constitutional claims could support such a construction of a review preclusion statute; and that the legislative history, as the court of appeals acknowledged (App. 10a), contains no such express indication that constitutional claims were to be precluded (let alone that *as-applied* claims were to be precluded and facial claims permitted).[1] The respondents have no answer to these points.

Even more importantly, the judicial respondents fail to acknowledge that the *reason* precedents of this Court and the circuits — with the exception of the decision below[2] — have

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[1] Although the judicial respondents assert that the D.C. Circuit majority's legislative history analysis supports its conclusion that there was a clear expression of legislative intent to foreclose constitutional claims, the majority conceded that it was able to cite no statement anywhere in the legislative history that review of constitutional claims was to be foreclosed. Instead, the legislative history reviewed by the majority established no more than that Congress intended to include a finality provision in the statute (which is of course true whenever a statute contains such a provision) and that at one point in the legislative history, a backer of one version of the legislation noted that this Court's decisions indicate that judicial review of constitutional claims may be required — a point that would tend to suggest an *absence* of intention to foreclose such claims.

[2] The judicial respondents cite the Third Circuit's unpublished decision in *Cunningham v. Becker*, No. 01-1489 (3d Cir. Aug. 23, 2001), but since the Third Circuit itself regards the opinion as nonprecedential, it hardly advances their position. The judicial respondents further assert that *Cunningham* illustrates the danger that if the statute is not read to preclude as-applied constitutional claims, disgruntled complainants will file constitutional challenges to the dismissal of complaints under the Act.

*(footnote continued)*

read statutes not to preclude review of constitutional claims is that such a construction itself poses grave constitutional questions. *See Webster*, 486 at 603. In light of the Judicial Conference Review Committee's determination that it lacked authority to entertain Judge McBryde's as-applied constitutional challenges (App. 150a-51a), the effect of the D.C. Circuit majority's decision is to "den[y] *any* forum — federal, state or agency — for the resolution of a federal constitutional claim," *Bartlett v. Bowen*, 816 F.2d 695, 704 (D.C. Cir. 1987), a result this Court has so far refused to countenance and that lower federal courts (including the D.C. Circuit itself) have stated would be unconstitutional. *See id.*; *see also Marozsan v. United States*, 852 F.2d 1469 (7th Cir. 1988) ("A statute which precludes review of such obviously unconstitutional decisions must be just as unconstitutional as the underlying action ....").

That the constitutional claims precluded are as-applied as opposed to facial ones is of no moment. This Court's own decisions in the area have involved as-applied claims (*e.g., Webster*), and, as the Seventh Circuit has observed, "[i]t is hard to see how the Court would insist on the right to review the constitutionality of legislation, but hold immune from review all unconstitutional administrative actions taken pursuant to that legislation." *Maroszan*, 852 F.2d at 1476.

Nor is it an answer to this point, as the judicial respondents suggest, that although the D.C. Circuit's ruling denies judicial review of as-applied constitutional claims, those

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But because a complainant would generally have no legally protected interest in whether a judge were sanctioned, such claims would in most cases be dismissed as frivolous even if not barred by § 372(c)(10) (as the courts in *Becker* dismissed the plaintiffs' facial constitutional challenge). To the extent there might be circumstances in which a complainant *did* have a valid constitutional claim (for example, if a chief circuit judge dismissed complaints in a racially discriminatory manner), precluding review of such a claim would no more acceptable under the Constitution and statute than preclusion of Judge McBryde's claims.

claims are still subject to consideration by the Article III judges who make up the judicial councils and the Judicial Conference. Given that those bodies have expressly disclaimed authority (and institutional competence) to conduct constitutional adjudication (App. 150a-51a), the administrative review process under the Act plainly cannot function as an adequate substitute for a court's consideration of constitutional claims, regardless of the fact that the members of those bodies are also Article III judges. Indeed, although they now assert that the D.C. Circuit's preclusion decision was correct, the judicial respondents conceded below that the statutory finality provision did not bar Judge McBryde's constitutional claims, precisely because the Conference Review Committee had expressly stated in its own memorandum and order that "[t]he courts of the United States are open for the adjudication of such questions." App. 151a.

Moreover, even if the councils and the Conference were to assume the function of hearing constitutional claims, there is all the difference in the world between consideration by an administrative body (be it composed of judges, bureaucrats, or anyone else) of whether *its own actions* violate the Constitution, and independent review of those actions by Article III judges convened as a *court of law*. The Fifth Circuit's decision in *In re McBryde*, 117 F.3d 208 (5th Cir. 1997), illustrates the point. There, the Chief Judge of the Northern District of Texas and the Fifth Circuit Judicial Council — Article III judges all — took actions in their administrative capacities to interfere in Judge McBryde's adjudication of cases properly before him. When those actions were subjected to the rigors of a challenge in a court of record required to conform its decision to the law, the Article III judges who composed the court found their colleagues' administrative actions unlawful. As *In re McBryde* strikingly demonstrates, giving administrative decisionmaking power to officials who happen to be judges is no substitute for *judicial review*.

The question starkly posed here is whether this Court should let stand, for the first time, a decision holding that a

generally stated finality clause in a statute bars judicial review of constitutional claims. That the constitutional claims the lower court held to be foreclosed go to the heart of judicial independence under Article III of the Constitution is all the more reason not to let the D.C. Circuit's preclusion ruling go unreviewed. Whether federal judges, alone among litigants in the United States courts, are to be barred from raising constitutional challenges to administrative punishments imposed on them is an issue this Court should decide.

## II. This Court Should Decide the Constitutionality of Punishing a Judge for his Judicial Decisionmaking.

The judicial respondents profess not to understand the as-applied constitutional claim at the heart of the second question presented in this matter. *See* Jud. Resp. Br. in Opp. 20-21. The claim, however, is by no means "difficult to parse." *Id.* In a nutshell, it is that the judicial independence guaranteed by Article III is infringed if a judge is punished (or "sanctioned" or "disciplined") based on the merits of procedural and substantive decisions, rulings and judicial actions in cases properly before him as a judge.[3] Contrary to the suggestion of the judicial respondents, this claim is squarely presented in this case and does not require the Court either to ignore factual findings made below (*id.* at 22) or to "assume" that "anything that a federal judge does as a judge is a 'ruling' or 'action' that is 'based on the merits'" (*id.* at 20). The claim requires only that the Court examine what the Council

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[3] In addition to purporting not to understand this claim, the judicial respondents inexplicably suggest that Judge McBryde is requesting that this Court entertain the claim even if it does not address the D.C. Circuit's antecedent preclusion ruling. *See* Jud. Resp. Br. in Opp. 19. Obviously, the Court can review the as-applied constitutional challenge only if it is reviewable, and nothing in the Petition for Certiorari suggests otherwise. *See* Pet. for Cert. 15 ("As Judge Tatel recognized, rejection of the panel majority's flawed preclusion analysis brings this [as-applied constitutional] issue squarely to the forefront.").

and Conference actually did, rather than their own self-serving characterizations of their actions.

For example, the basis for the punishment of Judge McBryde by the Judicial Council included, crucially, that he "imposed unwarranted sanctions upon lawyers" (App. 160a). The imposition of a sanction by a judge is unmistakably a ruling made in a case before him, and the assertion that the sanction is "unwarranted" can only be understood as an assessment of the merits of that ruling. It is simply nonsense to say, on the one hand, that Judge McBryde was disciplined for imposing unwarranted sanctions and, on the other, that the Council and the Conference Review Committee found as a "fact" that he was not disciplined based on the merits of his procedural or substantive rulings.

Similarly, as detailed in the Petition,[4] and as substantiated by the report of the committee of the Judicial Council (App. 163a-301a), the "attacks" by Judge McBryde on lawyers and others largely involved findings and credibility determinations he made and orders he issued in cases properly before him, and his "arbitrary," "abusive" and "intimidating" conduct consisted largely in his enforcement of procedural trial

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[4] The judicial respondents assert that the Petition mischaracterizes the basis for the Council's actions, but it identifies only two supposed mischaracterizations: the statements that the Council's actions were based in part on Judge McBryde's prohibition of newspapers in the courtroom and on his dress code for participants in jury trials. These are not mischaracterizations. As to newspapers, the committee report prominently cited the testimony of a lawyer that the atmosphere in Judge McBryde's courtroom was like "walking on eggshells." App. 261a. In the original transcript, the witness explained what he meant by "walking on eggshells" by recounting that a court security officer had advised him to put his newspaper away before Judge McBryde took the bench. J.A. 514. Similarly, a federal public defender whose testimony was cited in the committee report for the "oppressive" atmosphere in Judge McBryde's courtroom (App. 261a) complained in particular about the dress code. J.A. 405-08. Moreover, because the brief in opposition does not specifically identify any other supposed inaccuracies beyond these two, any claim that there are others is waived. *See* S. Ct. R. 15.2.

rulings (*see* App. 251a-263a). The judicial respondents' insistence that, as a matter of "fact," the actions taken against Judge McBryde were not based on disagreement with the merits of his judicial rulings cannot obscure what is apparent from the face of their own orders. In short, it is the judicial respondents, not Judge McBryde, who seek to avoid the issue by relying on "characterizations" of the actions below.

Moreover, the judicial respondents' assertion that Judge McBryde's position rests on the assumption that anything a judge does is a "ruling" is a red herring. This is not a case where a judge has committed an assault or employed racial epithets in the course of conducting judicial business — or even raised his voice — and Judge McBryde's position that disciplining him for the actions at issue is unconstitutional in no way turns on answers to hypothetical questions about what should be the result in such cases. *Cf.* Jud. Resp. Br. in Opp. 20. Here, although the Conference Review Committee asserted that Judge McBryde was properly disciplined based on a "pattern of conduct that is evidenced by [his] orders and rulings" (App. 143a), the only "conduct" those orders and rulings "evidenced" was their own issuance, and the only reason that "conduct" was deemed a basis for discipline was that it was "harsh" and "unwarranted" — that is, that the orders and rulings were *wrong on the merits*.

Other than their unpersuasive argument that, as a matter of "fact," Judge McBryde was not actually punished for the merits of his substantive and procedural rulings, the judicial respondents offer virtually no reason why Judge McBryde's as-applied challenge does not merit this Court's review. They do not contend that sanctioning a judge based on the substance of his judicial actions does not affect his judicial independence, nor do they assert that the legitimacy of such sanctions is not an issue of importance to the federal judiciary. And their continued insistence that the sanctions against Judge McBryde were, in the end, appropriate, is simply an argument on the merits, not a reason why this Court should not review the issue.

**III. The Issue of the Act's Facial Constitutionality Also Deserves This Court's Attention.**

The United States insists that the expiration of the case suspension and disqualification sanctions renders Judge McBryde's facial challenge to the Act partially moot and thus prevents this Court from reaching the constitutionally most troubling feature of the Act: its provision that judicial administrative bodies shall share in the power, granted by the Constititution exclusively to the President and the Senate (in the appointment provisions) and to the House and Senate (in the impeachment provisions), to determine what persons are fit to exercise the judicial power of the United States. The United States' mootness analysis, however, does not address the "here-and-now subservience" that the Act continues to impose on Judge McBryde. *See WMATA v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991). Moreover, because the Act permits only "temporary" suspensions (28 U.S.C. § 372(c)(6)(B)(iv)), the consequence of the government's mootness argument would be to effectively immunize the Act's constitutionality from judicial scrutiny. The mootness doctrine is not so inflexible. *See Honig v. Doe*, 484 U.S. 305, 323 (1988).[5]

On the merits, the respondents do not contest that the constitutionality of granting committees of judges disciplinary power over other judges has generated much scholarly and judicial debate, nor do they argue that a definitive resolu-

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[5] The judicial respondents (but not the United States) quibble with the Petition for not designating mootness a separate question presented. The D.C. Circuit majority's discussion of mootness was inseparable from its consideration of the scope of the facial constitutional challenge, and it is fairly comprised within the third question presented. *See, e.g., Caspari v. Bohlen*, 510 U.S. 383, 388-90 (1994). Moreover, the Petition makes abundantly clear that it challenges the mootness holding as part of its challenge to the resolution of the constitutional claims. *Compare Peters v. Kiff*, 407 U.S. 493, 495 (1972) (entertaining an issue under such circumstances), *with Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (declining to entertain a question where *nothing* in the petition raised it).

tion of the debate is not desirable. Instead, they suggest that the debate was already resolved by this Court in *Chandler v. Judicial Council*, 398 U.S. 74 (1970), and by the Eleventh Circuit in *Matter of Certain Complaints Under Investigation*, 783 F.2d 1488, 1508-10 (11th Cir. 1986). In fact, both courts expressly *declined* to reach the merits of the constitutionality of giving judges case suspension authority over fellow judges, and both decisions recognize that the issue is a difficult one. *See id.* at 1510.

Respondents also urge that the constitutional impeachment remedy is nonexclusive, and offer as proof that executive officers subject to impeachment may also be removed by the President. The argument overlooks, however, the fundamental difference between a unitary and hierarchical executive branch subject to the President's direct supervision, *see Clinton v. Jones*, 520 U.S. 681, 710-711 (1997) (Breyer, J., concurring in judgment), and a judicial branch in which the structure of *courts* is hierarchical but the tenure of each individual *judge* is expressly protected by Article III, section 1.

**IV. The Absence of Statutory Authority for the Actions Against Judge McBryde Also Merits Review.**

The judicial respondents' argument that the Court should not entertain Judge McBryde's statutory claims rests largely on the assertion that they present merely factual issues. Jud. Resp. Br. in Opp. 28. In fact, the issues they pose are exclusively legal: whether the statute precludes claims that a judicial council acted in the absence of statutory authority, whether a judge may be sanctioned for actions not the subject of any complaint, and whether the statute bars discipline based on the merits of procedural and substantive rulings.

The judicial respondents further assert that, although the conduct for which Judge McBryde was sanctioned was for the most part not the subject of any complaint, Fifth Circuit Complaint Rule 9(A) authorized expansion of the investigation beyond the scope of the complaints. But a rule cannot confer authority beyond that authorized by statute, *see Bowen*

*v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and the statute clearly contemplates discipline based on a complaint. Moreover, even if an *investigation* beyond the bounds of a complaint may be permissible, if that investigation does not lead to the "identification" of additional complaints, it cannot expand the scope of the discipline ultimately authorized under the Act. *See* 28 U.S.C. § 372(c)(1).

As for the statutory prohibition on complaints "directly related to the merits of a decision or procedural ruling," the judicial respondents contend that because the statute states only that such complaints "may" be dismissed (§ 372(c)(3)), it must be read to mean that dismissal of merits-related complaints is discretionary, not mandatory. The judicial respondents' position overlooks that in statutes, "may" sometimes means "shall" where the context demands. *United States v. Rodgers*, 461 U.S. 677, 706 (1983); *see, e.g., Tashima v. Administrative Office of U.S. Courts*, 967 F.2d 1264 (9th Cir. 1992). This is such a case. If a merits-related complaint were cognizable under the statute, it would make no sense to permit a chief judge to dismiss it for that reason. Thus, as the Fifth Circuit noted in *In re McBryde*, the statute must "requir[e] the dismissal" of such complaints. App. 355a. Contrary to the position it now takes in the judicial respondents' brief in opposition, the Conference Review Committee's own decision purported to acknowledge that "a judge indeed may not be sanctioned out of disagreement with the merits of rulings" (App. 143a) — though it then proceeded to do just that.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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